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In The

Supreme Court of the United States

CUSTER COUNTY ACTION ASSOCIATION; NATIONAL AIRSPACE COALITION; THE WILDERNESS SOCIETY; CUSTER COUNTY AIRPORT AUTHORITY; THE BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY, COLORADO; LA VETA PEACE OF AIR ALLIANCE; HUERFANO VALLEY CITIZENS ALLIANCE; WOLF SPRINGS RANCHES, INC.; AND CUSTER COUNTY BISON,

Petitioners,

v.

JANE F. GARVEY, AS ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES AIR FORCE MAJOR GENERAL PAUL A. WEAVER, JR., AS DIRECTOR OF THE AIR NATIONAL GUARD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tenth Circuit properly set aside the Federal Aviation Act provisions for judicial review of Federal Aviation Administration ("FAA") decisions allocating navigable airspace for military use on the grounds that the political question doctrine precludes the federal courts from "second-guessing" FAA decisions.

II. Whether the FAA and the Tenth Circuit can exempt the FAA from the Federal Aviation Act requirement that the FAA make specific, written and reasonable findings that airspace is necessary in the interest of national defense before allocating that airspace for military use.

III. Whether the National Environmental Policy Act required the FAA and the Air National Guard ("ANG") to broaden the scope of the Environmental Impact Statement for the Colorado Airspace Initiative ("CAI") to consider the environmental impact of the nationwide proliferation of military airspace.

IV. Whether the Third Amendment prohibits the military from occupying non-navigable airspace over private property during peacetime without the owner's consent.

LIST OF PARTIES AND CORPORATE DISCLOSURE

Petitioners are Custer County Action Association; National Airspace Coalition; The Wilderness Society; Custer County Airport Authority; The Board of County Commissioners of Custer County, Colorado; La Veta Peace of Air Alliance; Huerfano Valley Citizens Alliance; Wolf Springs Ranches, Inc.; and Custer County Bison. None of the Petitioners have parent companies and no publicly held company has any financial interest in any of the Petitioners.

Respondents are Jane F. Garvey, as Administrator of the Federal Aviation Administration, and United States Air Force Major General Paul A. Weaver, Jr., as Director of the Air National Guard, and both were sued in their official capacities only.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES AND CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. WHETHER FAA DECISIONS REGARDING THE ALLOCATION OF NAVIGABLE AIRSPACE FOR MILITARY USE ARE IMMUNE FROM JUDICIAL REVIEW IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT	8
A. The Tenth Circuit Improperly Expanded The Political Question Doctrine When It Refused To Review The FAA's Decision To Establish The Colorado Airspace Initiative Pursuant To 49 U.S.C. § 46110 And 5 U.S.C. § 706 On The Grounds That The FAA's Decision Was Akin To Military Action	8
B. The Tenth Circuit's Refusal To Review FAA Decisions Allocating Military Airspace Allows Arbitrary Decisions Unsupported By Substantial Evidence To Stand	12

TABLE OF CONTENTS – Continued

Page

II. WHETHER FEDERAL COURTS CAN EXEMPT THE FAA FROM THE FEDERAL AVIATION ACT REQUIREMENT THAT THE FAA MAKE A SPECIFIC FINDING OF NECESSITY BEFORE IT ALLOCATES AIRSPACE FOR MILITARY USE IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT 13

A. The Federal Aviation Act Provides That The FAA Cannot Establish Any Airspace For Military Use Without An Initial Determination That The Airspace In Question Is Necessary In The Interest Of National Defense 13

1. The FAA Cannot Exempt Its Own Actions From A Congressional Mandate Through The Use Of Administrative Classifications Of Special Use Airspace 15

2. Federal Courts Cannot Exempt The FAA From The Federal Aviation Act Requirement That It Make A Specific Written Finding That The Proposed Military Airspace Is Necessary In The Interest Of National Defense 18

B. The Tenth Circuit's Holding That The FAA Did Not Have To Make An Objectively Reasonable Specific Finding Of Necessity Conflicts With Prior Decisions Of This Court 19

TABLE OF CONTENTS – Continued

Page

III. WHETHER THE NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA") REQUIRED THE FAA AND THE ANG TO CONSIDER THE ENVIRONMENTAL IMPACT OF THE NATIONWIDE PROLIFERATION OF MILITARY AIRSPACE IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT..... 22

IV. WHETHER THE THIRD AMENDMENT PROHIBITS THE MILITARY FROM OCCUPYING NON-NAVIGABLE AIRSPACE OVER PRIVATE PROPERTY DURING PEACETIME WITHOUT THE OWNER'S CONSENT IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW..... 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arnhold v. United States, No. 88-0934C(3), 1989 U.S. Dist. LEXIS 17904 (E.D. Mo. June 13, 1989) 30

Brown v. United States, 73 F.3d 1100 (Fed. Cir. 1996) 27

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) 15, 20, 21

Custer County Action Ass'n v. Garvey, 256 F.3d 1024 (10th Cir. 2001) 1

D & F Afonso Realty Trust v. Garvey, 216 F.3d 1191 (D.C. Cir. 2000) 21

Dunlop v. Bachowski, 421 U.S. 560 (1975) *overruled in part on other grounds, Local No. 82 v. Crowley*, 467 U.S. 526 (1984) 9

Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) 27, 29

Florida v. Riley, 488 U.S. 445 (1989) 29

Franklin v. Massachusetts, 505 U.S. 788 (1992) 18

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 22

Kyllo v. United States, 121 S. Ct. 2038 (2001) 29

Laird v. Tatum, 408 U.S. 1 (1972) 27

Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998) 25, 26

NORML v. Mullen, 608 F. Supp. 945 (N.D. Cal. 1985) 29

TABLE OF AUTHORITIES – Continued

Page

National Parks & Conservation Ass'n v. FAA, 998 F.2d 1523 (10th Cir. 1993) 5

National Wildlife Fed'n v. Appalachian Regional Comm'n, 677 F.2d 883 (D.C. Cir. 1981) 23, 25

Park N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985) 15

Southern Cal. Aerial Advertisers' Ass'n v. FAA, 881 F.2d 672 (9th Cir. 1989) 18

United States v. Morton Salt Co., 338 U.S. 632 (1950) 12

United States v. Causby, 328 U.S. 256 (1946) 27

U.S. CONSTITUTION AND FEDERAL STATUTES

U.S. Const. amend. III 1, 26, 29

5 U.S.C. § 553(a)(1) 2, 11

5 U.S.C. § 706 ..... 2, 8, 9

5 U.S.C. § 706(2)(A) 12, 21

28 U.S.C. § 1254(1) 1

42 U.S.C. § 4332 .....2, 22

49 U.S.C. § 106(c)-(d) 2, 10

49 U.S.C. § 40102(a)(30) 2, 28

49 U.S.C. § 40103(b) 2, 6, 8, 28

49 U.S.C. § 40103(b)(3) ..... *passim*

49 U.S.C. § 40103(b)(4) 6, 11

49 U.S.C. § 44103(b)(2) 2, 9

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 46105(b) 2, 15, 18, 19, 21

49 U.S.C. § 46110 ..... 2, 5, 8, 11, 12

49 U.S.C. § 46110(c) 2, 11, 12

LEGISLATIVE HISTORY

Statements of Dr. Leslie A. Bryan and A.B. McMullen: *The Federal Aviation Act: Hearing on H.R. 12616 Before the House Subcomm. On Transportation and Commerce of the Comm. On Interstate and Foreign Commerce*, 85th Cong. 167-68, 232-33 (1958) 10

H.R. Conference Report No. 2556 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3767 10

FEDERAL REGULATIONS

14 C.F.R. § 73.3(a) 2

14 C.F.R. § 91.119(a)-(c) 2, 28

40 C.F.R. § 1500.1(c) 22

40 C.F.R. § 1508.25(a)(1) 2

40 C.F.R. § 1508.25(a)(1)(iii) 23, 24

FAA Order 7400.2D 2, 13, 14, 17

FAA Order 7610.4J 2, 14

OTHER

58 Fed. Reg. 36948 (July 9, 1993) 4

64 Fed. Reg. 54721 (Oct. 7, 1999) 1

PETITION FOR WRIT OF CERTIORARI

Petitioners Custer County Action Association, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in *Custer County Action Ass'n v. Garvey* on July 19, 2001.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001), and is reprinted in the appendix at page A-1. The FAA Order reviewed by the Tenth Circuit was the Record of Decision ("ROD") issued by the FAA on October 1, 1999. The ROD is reported at 64 Fed. Reg. 54721 (Oct. 7, 1999), and is reprinted at A-41. The Tenth Circuit also reviewed the Record of Decision of the Air National Guard, dated October 28, 1997, which did not become final agency action until it was approved by the FAA in the ROD. The ANG's Record of Decision is reprinted at A-59.

JURISDICTION

On July 19, 2001, the Tenth Circuit affirmed the FAA's ROD (including the Air National Guard's Record of Decision) establishing the Colorado Airspace Initiative ("CAI"). This Court has jurisdiction to review the decision of the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Third Amendment to the United States Constitution, reprinted at A-92.

The Federal Aviation Act, 49 U.S.C. §§ 106(c)-(d), 40102(a)(30), 40103(b), 44103(b)(2), 46105(b), 46110(a)-(c), reprinted at A-92-97.

The Administrative Procedure Act, 5 U.S.C. §§ 553(a)(1), 706: reprinted at A-97-98.

The National Environmental Protection Act, 42 U.S.C. § 4332, reprinted at A-98.

14 C.F.R. §§ 73.3(a), 91.119(a)-(c), reprinted at A-102.

40 C.F.R. §§ 1500.1, 1508.25(a)(1), reprinted at A-100-01.

FAA Order 7400.2D § 27-3, reprinted at A-104.

FAA Order 7610.4J § 9-1-4, reprinted at A-125.

STATEMENT OF THE CASE

The National Airspace System administered by the FAA includes airspace that has been set aside for use by military aircraft. So far, forty percent (40%) of the nation's airspace has been allocated to the military as Special Use Airspace.[1] As a result, one million square miles of property in the United States are overflown regularly by military aircraft conducting combat training exercises. *See* Map at A-168 (depicting updated information originally found in *Long Range Airspace Planning* (1992), A-169). Proposals for further military airspace expansion are pending throughout the United States.

Special Use Airspace includes Military Operations Areas ("MOAs"), Military Training Routes ("MTRs") and Restricted Areas ("RAs"). An MOA is an airspace of defined vertical and lateral boundaries in which aircraft

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[1] Special Use Airspace consists of airspace of defined dimensions identified by an area on the surface of the earth wherein activities must be confined because of their nature, or wherein limitations are imposed upon aircraft operations that are not a part of those activities, or both. 14 C.F.R. § 73.3(a).

can perform military training activities separated from instrument flight rules traffic, including such practice activities as aircraft intercepts, turning and evasive maneuvers, and air combat maneuvers. An MTR is a military highway used for low-altitude military operations at high airspeeds. RAs are established for many purposes. With respect to military training, RAs are usually reserved for training involving either ground- or air-based weapons and all civilian aircraft is restricted to ensure the safety of aircraft not participating in the military exercise.

Military aircraft have been using the airspace above Colorado for training exercises, flights and bombing runs for over 25 years. Units which train in Colorado airspace include, among others, the 140th Tactical Fighter Wing of the Colorado Air National Guard; the 302nd Airlift Wing from Peterson Air Force Base, Colorado; the 150th Fighter Wing from Kirkland Air Force Base, New Mexico; and U.S. Army Helicopters from Fort Carson. Use of some key MOAs and MTRs has increased four-fold since Environmental Assessments were prepared for those areas in 1976 and 1977. Another key area, the Pinon Canyon MOA, was established with no environmental review at all. Exacerbating the environmental impact is the fact that ANG and other military pilots consistently violate the boundaries and altitude requirements established for these MOAs and MTRs.

The origins of the CAI can be traced to 1991, when the ANG proposed a new military airspace scheme referred to as the Redeye Complex. Public opposition to the Redeye Complex forced the ANG to issue a reformulated proposal that became known as the CAI. The CAI includes MOAs and MTRs that utilize the Airburst Bombing Range, a RA. *See* A-5-8. On July 9, 1993, the Air Force and ANG published a Notice of Intent to Prepare the

Draft Environmental Impact Statement for the Initiative: 58 Fed. Reg. 36948 (July 9, 1993).

In January 1994, the CAI Working Committee (the "Working Committee") was formed, consisting of representatives from the Air Force, the ANG, state and federal agencies, congressional offices, the Colorado Governor's office and public groups. The Working Committee met to discuss the Initiative and the preparation of the Draft EIS, and documented its recommendations for changes to the Initiative on May 25, 1994. The Working Committee concluded that the CAI was designed to serve an already obsolete Airburst Bombing Range, and recommended that:

> the Colorado Airspace Initiative be considered a temporary, stopgap solution to be implemented only over the short term to accommodate Colorado Air National Guard training requirements until a suitable alternative to the Airburst Range is available.

A-199.

In the Draft EIS, although the ANG ignored the recommendations of the Working Committee and refused to treat the Initiative as a temporary solution, it inexplicably informed decisionmakers that the Initiative was "designed according to the wishes" of the Working Committee. Nearly all of the public comments received on the DEIS were in opposition to the Initiative.

The Final EIS prepared by the ANG incorrectly stated that the preferred alternative (the CAI) would lead to a decrease in military airspace utilization in Colorado. In fact, the CAI expands the surface area over which military aircraft are permitted to operate in the state, thereby increasing the overall impact on private property and property owners in Colorado.

The ANG issued its Record of Decision adopting the Final EIS on October 28, 1997 and shortly thereafter submitted its airspace request to the FAA. Although large numbers of critical comments were submitted to the FAA, the FAA did not respond to that criticism and never independently considered the question of whether the requested airspace was necessary in the interest of national defense.

While the Initiative was before the FAA, the Colorado legislature, by joint resolution of the House and the Senate, requested that its key components be relocated and/or eliminated.

> [I]t is the will of the General Assembly that the Colorado Air National Guard shall diligently pursue with input from community interest groups, funding for the relocation of Airburst Bombing Range and the potential elimination of La Veta Military Operation Area and its associated Military Training Routes.

A-206. The FAA ignored these and numerous other requests and concerns from federal and state agencies, as well as numerous comments from individuals who had experienced the disruptive and startling effect of continual overflights of their property. Instead, the FAA simply adopted the ANG's FEIS and, on October 1, 1999, issued a Record of Decision ("ROD") approving the Special Use Airspace requested by the ANG. A-41-58. The FAA ROD was the final agency action pertaining to the CAI.

The Tenth Circuit reviewed the FAA and ANG Orders pursuant to 49 U.S.C. § 46110 and the Tenth Circuit rule promulgated in *National Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523 (10th Cir. 1993) (extending judicial review to the ANG's decision and final Environmental Impact Statement as incorporated into the FAA's final decision). The Tenth Circuit affirmed the orders.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully request that this Court grant certiorari because the United States Court of Appeals for the Tenth Circuit has decided several important questions of federal law that have not been, but should be, settled by this Court.

First, even though the Federal Aviation Act mandates that the FAA independently review the ANG's proposed military airspace allocations and make findings, supported by record evidence, as to whether the proposed allocation is "necessary in the interest of national defense," the Tenth Circuit refused to review the basis of the FAA's decision to establish the CAI, holding that the political question doctrine trumped the specific statutory provisions at issue. *See* A-11-12. However, the political question doctrine limits review only of a narrow range of actions made by federal courts to "military" agencies, and the Federal Aviation Act specifically provides that military airspace allocation decisions are made by the civilian Administrator and subject to judicial review just like every other civilian agency action. 49 U.S.C. § 40103(b)(3), (4).

Second, even though the FAA did not make a finding of necessity, and therefore did not have the authority to act, the Tenth Circuit affirmed the FAA order establishing the CAI. The Tenth Circuit relied on a combination of faulty statutory interpretation and the FAA's own improper administrative classifications to exempt the FAA from the statutory requirement that its orders include the findings of fact on which they are based. The Tenth Circuit held that 49 U.S.C. § 40103(b) only applied to "Restricted Areas" and excused the FAA from making formal findings regarding the military necessity of proposed military airspace:

> [E]ven if 49 U.S.C. § 40103(b)(3) does apply to some portion of the Initiative as approved by the FAA, nothing in that statute mandates that the FAA make an express finding of necessity. In the absence of a specific statutory directive, the law does not always require an agency to make formal findings.

A-13. This holding is in direct conflict with the Federal Aviation Act and previous decisions of this Court and the D.C. Circuit Court of Appeals, all of which require the FAA to establish that its actions can reasonably be said to be within the scope of its authority.

A third important federal question is whether the FAA and ANG were required by the National Environmental Protection Act ("NEPA") to prepare a programmatic Environmental Impact Statement ("EIS") to assess the connected impact of the CAI and the nationwide proliferation of military airspace. The Tenth Circuit held that a programmatic EIS was not required because there was no "clear nexus between the Initiative and other military airspace proposals across the Nation." A-25-26. Neither the FAA nor the Tenth Circuit asked, as required by NEPA, whether there was a "clear nexus" between the CAI and the national military airspace program. The CAI is just one interdependent part of this program, which is centrally managed as a national system, on a national level. The nationwide proliferation of military airspace pursuant to this program has environmental implications that must be addressed under NEPA.

Finally, the question of whether the FAA and ANG violated the Third Amendment when they charted airspace as low as 300 feet above ground level throughout segments of the MOAs and MTRs comprising the CAI, including areas over houses, ranches, and farms, is an important constitutional question worthy of review. The

Tenth Circuit found no constitutional violation, stating that:

> We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners' consent. . . . It is not reasonable to expect privacy from the lawful operation of military aircraft in public navigable airspace

A-39. In fact, many ANG flights under the CAI do *not* occur in public navigable airspace (i.e., any flights within 500 feet of a house, person, vessel, structure, etc.). Whether these low-level military flights, with their accompanying noise intrusions into private homes, when sufficiently severe so as to rattle walls, break dishes, disrupt sleep, and drown out conversation, are actionable under the Third Amendment is an important federal question that should be decided by this Court.

I. WHETHER FAA DECISIONS REGARDING THE ALLOCATION OF NAVIGABLE AIRSPACE FOR MILITARY USE ARE IMMUNE FROM JUDICIAL REVIEW IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

A. The Tenth Circuit Improperly Expanded The Political Question Doctrine When It Refused To Review The FAA's Decision To Establish The Colorado Airspace Initiative Pursuant To 49 U.S.C. § 46110 And 5 U.S.C. § 706 On The Grounds That The FAA's Decision Was Akin To Military Action.

While section 40103(b) of the Federal Aviation Act allows the Administrator to establish military airspace, section 46110 provides that the Courts of Appeals have exclusive jurisdiction to "affirm, amend, modify, or set

aside any part of the order and may order the Secretary or Administrator to conduct further proceedings." The Courts of Appeals must review FAA orders pursuant to the standards set forth in the Administrative Procedure Act, where Congress expressly charged the judiciary with ensuring that agencies do not make decisions in an arbitrary or capricious manner, or decisions unsupported by substantial evidence. 5 U.S.C. § 706.

Traditionally, federal courts have been very reluctant to waive judicial review of agency decisions. In the absence of an express prohibition of judicial review in a statute, an agency "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) *overruled in part on other grounds, Local No. 82 v. Crowley*, 467 U.S. 526 (1984). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* (citations omitted). When Congress desired to immunize FAA decisionmaking under the Federal Aviation Act from judicial review, it did so expressly. *See* 49 U.S.C. § 44103(b)(2) (providing that a decision of the Administrator to issue a certificate of registration of aircraft after revocation for a controlled substance violation is not subject to administrative or judicial review).

Contrary to both the Federal Aviation Act and this Court's ruling in *Dunlop*, the Tenth Circuit restricted Petitioners' access to judicial review. Relying on an expansive and unprecedented interpretation of the political question doctrine, the Tenth Circuit refused to review Petitioners' administrative law claims because it did not want to "second guess" or "interfere" with the FAA's airspace designation because it involved military considerations. This was an improper and unprecedented expansion of

the political question doctrine, which exempts only a very narrow category of decisions made by the military itself, and not by civilian agencies such as the FAA.

The Tenth Circuit's refusal to review this FAA action, and the FAA's equally improper deference to the ANG, leaves the military as the sole decisionmaker regarding how Colorado airspace will be used. The text and history of the Federal Aviation Act illustrate that Congress made a specific choice to place the control of navigable airspace not with the military, but in the hands of a civilian agency accountable to the federal courts under the Administrative Procedure Act. The extent of the authority of the Administrator of the FAA and the nature of the relationship between the military and the FAA were thoroughly discussed during the debates surrounding the passage of the Federal Aviation Act in 1958.

A primary concern of the testimony before the subcommittees was that civil control of the FAA must "be assured." Statement of Dr. Leslie A. Bryan, Chairman of the General Aviation Facilities Planning Group: *The Federal Aviation Act: Hearing on H.R. 12616 Before the House Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce*, 85th Cong. 167-68 (1958), A-139-40. *See also* Statement of A.B. McMullen, Executive Director of the National Association of State Aviation Officials: *Id.* at 232-33, A-159-60. Ultimately, Congress concluded that the Administrator of the FAA must be a civilian. If the administrator was a former officer in the armed services, the deputy administrator must be a person without any prior service as a regular military officer. H.R. Conference Report No. 2556 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3767. A-159-60. This statutory provision is codified at 49 U.S.C. § 106(c)-(d).

The Federal Aviation Act functionally provides that airspace allocation decisions must be free from undue military influence to ensure "maximum use of the navigable airspace by civil aircraft." 49 U.S.C. § 40103(b)(3). To that end, military involvement in the allocation of airspace is limited to a *"consultation"* between the Administrator and the Secretary of Defense. *Id.* (emphasis added). The Act explicitly provides that, in peacetime, the civilian Administrator has sole power to allocate airspace for military purposes, and in turn limits this power to those "areas in the airspace the Administrator decides are necessary in the interest of national defense." *Id.* Unless specifically exempted from review by statute, all orders issued by the FAA are subject to judicial review in the United States Court of Appeals pursuant to 49 U.S.C. § 46110, and all factual findings of the FAA must be supported by "substantial evidence." § 46110(c).

The APA contains a "military exception" that immunizes rulemaking decisions by military (not civilian) agencies from judicial review under the APA, in essence freeing the federal courts from the need to decide whether review of military decisions would violate the separation of powers doctrine. *See* 5 U.S.C. § 553(a)(1). But the FAA is a civilian agency. Moreover, in the Federal Aviation Act, Congress expressly provided that FAA regulations made pursuant to 49 U.S.C. § 40103(b)(3) are *not* exempt from the APA under the military exception. 49 U.S.C. § 40103(b)(4). The Tenth Circuit's application of the political question doctrine in this case is thus directly contrary to the unambiguous congressional intent as expressed in 49 U.S.C. § 40103(b), § 46110 and the Administrative Procedure Act. This unprecedented restriction on judicial review of FAA decisionmaking and military airspace acquisition presents an important federal court question worthy of this Court's review.

B. The Tenth Circuit's Refusal To Review FAA Decisions Allocating Military Airspace Allows Arbitrary Decisions Unsupported By Substantial Evidence To Stand.

Congress has expressly provided that the Court of Appeals shall "hold unlawful and set aside" FAA military airspace allocation decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." 49 U.S.C. § 46110; 5 U.S.C. § 706(2)(A). Additionally, the Court of Appeals must review the FAA's findings of fact to see whether they are supported by substantial evidence. 49 U.S.C. § 46110(c).

> The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

United States v. Morton Salt Co., 338 U.S. 632, 644 (1950). The courts, through judicial review of agency actions, serve the vital role of "dispassionate" and "disinterested" application of the APA safeguards. *Id.* at 640-41. The Tenth Circuit abrogated its duty to safeguard the administrative process when it refused to review the Administrator's decision because it didn't want to "second-guess" or "interfere" with the FAA's decision to establish the CAI. A-12.

Petitioners did not ask the Tenth Circuit to make a military decision – Petitioners asked the Tenth Circuit to review the FAA's decisionmaking process in light of the evidence that the FAA's decision to implement the CAI was arbitrary, capricious and unsupported by substantial evidence. Petitioners have been adversely affected by

agency action and inaction, and the Federal Aviation Act and Administrative Procedure Act allow them to seek relief. By exempting FAA airspace allocation decisions from judicial review, the Tenth Circuit has acted outside of its judicial authority and functionally held that any allocation of airspace for military purposes will stand regardless of how frivolous, arbitrary or capricious the decision may be.

II. WHETHER FEDERAL COURTS CAN EXEMPT THE FAA FROM THE FEDERAL AVIATION ACT REQUIREMENT THAT THE FAA MAKE A SPECIFIC FINDING OF NECESSITY BEFORE IT ALLOCATES AIRSPACE FOR MILITARY USE IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT

A. The Federal Aviation Act Provides That The FAA Cannot Establish Any Airspace For Military Use Without An Initial Determination That The Airspace In Question Is Necessary In The Interest Of National Defense.

The Federal Aviation Act directs the FAA to establish airspace for military use only in areas it decides are "necessary in the interest of national defense." 49 U.S.C. § 40103(b)(3)(A). This requirement is consistent with Congress's more general policy of "encourag[ing] and allow[ing] maximum use of the navigable airspace by civil aircraft." 49 U.S.C. § 40103(b)(3). The FAA recognizes that:

> while establishment of special use airspace is essential to national security and the military mission, unnecessary proliferation of these areas degrades the special use airspace program and adversely affects the overall efficiency of the National Airspace System.

FAA Order 7400.2D § 27-3a, A-105. Therefore, the FAA requires that:

> the volume of airspace to be included in any specific area of special use airspace and the time during which it is to be assigned shall be the *minimum required*. . . .

Id. at § 27-3b, A-105 (emphasis added). Furthermore, the FAA ordered that Special Use Airspace designations "shall be limited to the *minimum* number of areas necessary" and that Special Use Airspace activation "shall be limited to the *minimum* area, altitude, and time required for the activity/mission." FAA Order 7610.4J § 9-1-4, A-126 (emphasis added).

Petitioners argued to the Tenth Circuit that the FAA violated these mandates when it approved the CAI without ever making any determination that it is "necessary in the interest of national defense." The FAA's record is not only devoid of these findings, but is also devoid of any written analysis that would support such a finding, or demonstrate that relevant factors were considered.

Despite this complete lack of a record, the Tenth Circuit concluded that the statute did not require that the FAA make a specific finding of necessity before it established the CAI. The three bases for the Tenth Circuit's ruling were: (1) in light of the FAA's administratively created distinctions between MOAs, MTRs and other types of military airspace, the statute does not apply to the CAI; (2) even if the CAI includes airspace covered by the statute (such as Restricted Areas which even the Respondents admit are covered by the statute), the statute contains no explicit directive requiring the FAA to make a finding that the proposed airspace is necessary in the interest of national defense; and (3) the record demonstrated that the FAA believed that the CAI was necessary in the interest of national defense. A-13-14.

However, a plain language reading of the Federal Aviation Act illustrates that it applies to all decisions establishing military airspace, that all such decisions must be preceded by a determination that the allocation is necessary in the interest of national defense and that the basis for all FAA orders must be supported by findings of fact. 49 U.S.C. §§ 40103(b)(3), 46105(b). Further, the FAA's decision to establish military airspace cannot be based on its subjective "belief" that the airspace is necessary – previous decisions of this Court establish that agency action must "reasonably be said to be within th[e] range" of an agency's statutory authority. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Under the Tenth Circuit's novel interpretation of the Federal Aviation Act, the military has, as a practical matter, been given unfettered discretion to designate the airspace it wants.

1. The FAA Cannot Exempt Its Own Actions From A Congressional Mandate Through The Use Of Administrative Classifications Of Special Use Airspace.

An agency's obligation to comply with the dictates of the statutes it administers is well-settled. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is

the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, Congress has directly spoken to the precise question at issue. The Federal Aviation Act sets forth a two part process for the FAA Administrator to follow when she "establishe[s] security provisions that will encourage and allow maximum use of the navigable airspace by civil airspace consistent with national security." 49 U.S.C. § 40103(b)(3). The statute provides that the Administrator, in consultation with the Secretary of Defense, shall:

(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; *and*

(B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in *those areas*.

49 U.S.C. § 40103(b)(3)(A), (B) (emphasis added).

The statute plainly requires that all military training airspace be distinguished and/or segregated from the National Airspace System, but only after the FAA Administrator first decides such airspace is necessary in the interest of the national defense. Once the Administrator makes this necessity determination, she then has the authority to restrict or prohibit civil aircraft in "*those* areas." 49 U.S.C. § 40103(b)(3)(B).

The Tenth Circuit discarded fundamental principles of statutory construction and read the statute backwards in order to exempt the CAI decision from the requirements of § 40103(b)(3). Under the Tenth Circuit's novel

interpretation of the Federal Aviation Act, the circumstances of § 40103(b)(3)(B) become a precondition to the obligations of § 40103(b)(3)(A) instead of the other way around. A-13. In other words, the Tenth Circuit held that the FAA's obligation under Part A, to "establish areas in the airspace the Administrator decides are in the interest of national defense" is triggered only if, under Part B, flight of civil aircraft must be regulated or restricted in those areas because they cannot be identified, located or controlled. *Id.*

On the basis of this statutory misreading, the Tenth Circuit then relied on the FAA's own administrative distinctions between Military Operation Areas and Military Training Routes on the one hand and Restricted Areas on the other hand. MOA and MTR flight activity is not typically limited or altogether prohibited, as occurs in RAs.[2] Relying on this distinction, the Tenth Circuit incorrectly excused the FAA from determining whether the former (MOAs and MTRs) are "necessary in the interest of national defense." A-13. The Tenth Circuit thus improperly allowed the FAA to use administrative classifications to regulate itself out of the requirements of a congressional directive.

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[2] Although the FAA claimed that MOAs and MTRs were "non-rulemaking airspaces," in truth, the FAA does restrict civil aviation in MOAs and MTRs. *See, e.g.*, FAA Order 7400.2D § 31-7 (prohibiting IFR activity in MOAs absent "approved separation"), A-123-24.

2. Federal Courts Cannot Exempt The FAA From The Federal Aviation Act Requirement That It Make A Specific Written Finding That The Proposed Military Airspace Is Necessary In The Interest Of National Defense.

After exempting MTRs and MOAs from the necessity requirements of section 40103(b)(3)(A), the Tenth Circuit acknowledged that the Airburst Range Restricted Area (which is a pivotal component of the CAI) would undeniably be an "area" in which civil aircraft would be restricted under 49 U.S.C. § 40103(b)(3)(B) and that at least part of the CAI might be subject to 49 U.S.C. § 40103(b)(3)(A). However, instead of finally enforcing the FAA's statutory obligation to make a finding of necessity before allocating airspace for military use, the Tenth Circuit concluded that 49 U.S.C. § 40103(b)(3)(A) contains no statutory directive requiring the FAA to make a "formal finding" regarding the "necessity" of military airspace before establishing Restricted or Prohibited Areas. A-13.

In so holding, the Tenth Circuit improperly disregarded a section of the Federal Aviation Act which mandates that FAA orders include the findings of fact upon which they are based. 49 U.S.C. § 46105(b). The designation of the airspace comprising the Initiative, for the purposes of judicial review, is undeniably an "order." *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question [for determining when an agency order is final] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties"); *Southern Cal. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672, 675 (9th Cir. 1989) ("the APA defines 'order' broadly as 'the whole or part of a final disposition . . . of an agency in a matter other than rulemaking' ").

The Federal Aviation Act further requires that the Administrator base her decision to allocate airspace for military use on her decision that the allocation of airspace is "necessary in the interest of national defense." 49 U.S.C. § 40103(b)(3)(A). Reading these provisions *in pari materia*, the FAA must be required to make specific, written findings of fact supporting its determination of necessity, because the FAA order establishing the CAI must include the findings of fact upon which it was based, and the FAA is required to base its decision on a determination that the CAI was "necessary in the interest of national defense." At a minimum, whether 49 U.S.C. § 40103(b)(3)(A) and § 46105(b) require that the FAA make independent findings regarding the necessity of military airspace is an important question of federal law that this Court should resolve.

B. The Tenth Circuit's Holding That The FAA Did Not Have To Make An Objectively Reasonable Specific Finding Of Necessity Conflicts With Prior Decisions Of This Court.

As explained above, under the Federal Aviation Act, the FAA can establish airspace for military use only after it determines that such an allocation is "necessary in the interest of national defense." 49 U.S.C. § 40103(b)(3)(A). Despite this statutory requirement, the Tenth Circuit held that no formal finding of necessity was required, and observed that it was sufficient here that the FAA "believed" requested airspace was necessary in the interest of the national defense.[3] A-14. In so holding, the Tenth Circuit not only abdicated its own review obligations but

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[3] Significantly, the Tenth Circuit did *not* hold that the FAA in fact made a finding that the CAI was necessary in the interest of national defense. There was no evidence such a finding had ever been made, and it was not.

also improperly expanded the FAA's powers, which Congress itself has carefully, and narrowly, defined.

The Tenth Circuit based its holding upon a restrictive reading of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In the Tenth Circuit's view, that case stands for the proposition that an agency need not always issue formal findings to support its actions. A-13. But *Overton Park* does not excuse agencies from their obligation to act on the basis of reasoned decisions supported by reviewable records. Rather, *Overton Park* stands for the very different principle that reviewing courts must ensure that administrative agencies reasonably act within the scope of their statutory authority, and make decisions that are not arbitrary, capricious, or otherwise contrary to law. 401 U.S. 402.

In *Overton Park*, this Court set out a framework for courts to follow when they review an administrative action. First, the reviewing court must decide whether the agency acted within the scope of its statutory authority. *Id.* at 415. Here, the Tenth Circuit should have asked whether the FAA properly construed its statutory obligations in establishing airspace for military use. As described above, however, the Tenth Circuit failed to address this question, instead allowing the FAA to act without satisfying the statutory pre-condition of a necessity finding.

Second, under *Overton Park*, the reviewing court is to determine whether, on the facts, the agency can reasonably be said to have acted within the range of its authority and discretion. *Id.* The Tenth Circuit again failed to ask this question, and instead issued a one sentence statement that the record "amply demonstrates" that the FAA "believed" the CAI to be necessary, even though there was no evidence in the record that the FAA ever independently considered the issue of necessity, or reached any determination of its own with respect to that issue.

Third, *Overton Park* requires that a reviewing court must determine whether the actual decision made was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To make this decision, the court must engage in a searching and careful review to determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Overton Park*, 401 U.S. at 416. The Tenth Circuit did not just fail to engage in this searching and careful review, it improperly invoked the political question doctrine to avoid making any review of the FAA's decisionmaking process.

Finally, this Court required that the reviewing court determine whether the agency followed the necessary procedural requirements. *Id.* at 417. Yet again the Tenth Circuit overlooked this review obligation, and specifically ignored the requirement in the Federal Aviation Act that the FAA make specific findings that airspace is necessary in the interest of national defense before allocating it for military use. 49 U.S.C. §§ 40103(b)(3), 46105(b).

Under *Overton Park*, agencies must provide reviewing courts with at least some record documenting an actual decisionmaking process. If a reviewing court is given nothing to review, agency heads could easily overstep their authority and Congressional mandates could be rendered meaningless with noone to enforce them. *Overton Park*, 401 U.S. at 413. Without question, a statement of findings and reasons, as required by the Federal Aviation Act, is the most effective protection against arbitrariness. *Id.* at 416.[4]

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[4] Consistent with this Court's holding in *Overton Park*, the D.C. Circuit Court of Appeals has held that the FAA cannot take "an ipse dixit approach" to decisionmaking: "because we said so" is not a permissible justification for agency action. *D & F Afonso Realty Trust v. Garvey*, 216 F.3d 1191, 1196 (D.C. Cir.

Instead of ensuring that the FAA acted within the authority granted to it by Congress in the Federal Aviation Act, the Tenth Circuit expanded that authority by ignoring the statutory requirements (including the requirement that the FAA determine whether requested military airspace is "necessary in the interest of national defense"), by refusing to review the FAA's action, and by deferring to agency belief when reasoned decisionmaking was required. This Court should grant certiorari, and correct the Tenth Circuit's fundamental error.

III. WHETHER THE NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA") REQUIRED THE FAA AND THE ANG TO CONSIDER THE ENVIRONMENTAL IMPACT OF THE NATIONWIDE PROLIFERATION OF MILITARY AIRSPACE IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT.

Public officials have an obligation under NEPA to "make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). This includes an obligation to prepare an Environmental Impact Statement ("EIS") on proposals for all "major Federal actions significantly affecting the human environment." 42 U.S.C. § 4332. This serves to ensure that decisionmakers and the public are provided with information about the larger context in which a proposed action is to take place. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976) (stating that Department of Interior's admission that a programmatic EIS was

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2000) (reversing and remanding an FAA order where "the FAA did not consider relevant factors or sufficiently explain the basis of its decision" and this "post hoc rationalization for deviating from procedure and for failing to substantiate its [action] cannot pass muster as a matter of law").

required for a national coal leasing program was "well made" where "the new leasing program is a coherent plan of national scope, and its adoption surely has significant environmental consequences").

Without question, airspace is an important part of our environment, and federal programs affecting our airspace are subject to these environmental study requirements. As the ANG acknowledges, airspace is a "precious national resource." A-169. As such, it belongs to the citizens of this country. Congress has specifically directed that this national resource is to remain in civilian hands by charging the FAA to "encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security." 49 U.S.C. § 40103(b)(3).

"A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying a programmatic EIS is that a systematic program is likely to generate disparate yet related impacts." *National Wildlife Fed'n v. Appalachian Regional Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981). The purpose of a programmatic EIS is to promote better decisionmaking for major federal actions consisting of a number of related enterprises associated with a single program and planned together. *Id.*

Agencies must include an evaluation of the environmental impact of "connected actions" within the scope of an EIS. 40 C.F.R. § 1508.25(a)(1)(iii). Actions are connected if they "[a]re interdependent parts of a larger action and depend on the larger action for their justification." *Id.* Despite these requirements, the FAA has allowed the Air Force and other branches of the military to gradually and systematically set aside 40% of the nation's navigable airspace for military use without conducting any programmatic EIS of any sort. The military airspace network is an ever-expanding spiderweb of MTRs, MOAs, Restricted Areas, and other areas, all of which are linked, and through which military aircraft can

travel from one end of the country to the other. *See* Map of Existing and Proposed MOAs and MTRs, A-168 (depicting updated information originally found in *Long Range Airspace Planning* (1992), A-169). The CAI is merely one interdependent part of this national system. This nationwide military airspace network, and not merely its component parts, has significant impact on the human environment.

In refusing to mandate a programmatic EIS, the Tenth Circuit never considered whether justification for the CAI was dependent on the existence of the national military airspace program. Instead the Tenth Circuit asked and answered the wrong question: whether the justification for the CAI depended on other proposed airspace designations. It then concluded that the FAA and ANG were not required to analyze the environmental impact of the nationwide proliferation of military airspace because there was no "clear nexus" between the CAI and other military airspace proposals across the Nation. A-26.

As a result, the CAI was established without any analysis, as required by 40 C.F.R. § 1508.25(a)(1)(iii), of whether the various plans for Special Use Airspace expansion in the United States are "connected actions" because they are interdependent parts of the national military airspace program, and depend on that program for their justification. If the FAA and the Tenth Circuit had asked these questions, they would have had to consider the following facts, all of which establish that the CAI was an interdependent part of a national (and at the very least regional) plan:

- Military use airspace is centrally managed as a national system, on a national level, as evidenced by the fact that the CAI proposal originated in the ANG and FAA headquarters in Washington D.C.
- The USAF Airspace Master Plan (which according to the ANG, necessitates its current request for more airspace) "establishes the basis for a comprehensive

analysis of total Department of Defense requirements. . . . " FEIS at ix.

- The CAI is part of the "Federal mission" to provide the Department of Defense with "combat-ready aircrews and support personnel for worldwide deployments, should the need arise." ANG ROD, A-59.
- ANG units have increased as a percentage of the total military force and thus have assumed a more prominent role in our national defense. ANG ROD, A-60.
- "The ANG airspace planning focus is on *regional* and *interstate*." A-171.
- Regional Airspace Planning Committees meet to determine airspace requirements and are made up of senior ANG leaders from each state in a FAA region. A-169-173. The ANG has acknowledged that there is a role for a national Airspace Steering Committee. A-173.

Instead, the Tenth Circuit decision grants agencies permission to avoid their NEPA obligations by dividing the national military airspace program into component parts, each involving action with less significant environmental effects than if they were considered as a whole. Such "segmentation" is improper and contrary to the requirements of NEPA and its implementing regulations. *See, e.g., National Wildlife Fed'n*, 677 F.2d at 890 (" . . . the existence of a comprehensive program with cumulative environmental effects cannot be escaped by disingenuously describing it as only an amalgamation of unrelated smaller projects") (citations omitted)[5]; *Morongo Band*

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[5] The *National Wildlife Federation* court observed that in determining whether it is too late for an agency to comply with its obligation to issue a programmatic EIS, "[t]he question must be what agency decisions are yet to be made, and what decisions, although already made, remain open to revision. *National Wildlife Fed'n*, 677 F.2d at 892 (citation omitted). The

of Mission Indians v. FAA, 161 F.3d 569, 579 (9th Cir. 1998) ("connected actions must be considered together in order to preclude an agency from dividing a project into several smaller actions, each of which might have an insignificant environmental impact when considered in isolation, but which taken as a whole have a substantial impact") (citations omitted).

The Tenth Circuit's ruling allows the FAA and ANG to artificially segment the national military airspace program and thereby avoid preparing a programmatic EIS under NEPA. Whether that ruling is appropriate is an important federal question worthy of this Court's review.

IV. WHETHER THE THIRD AMENDMENT PROHIBITS THE MILITARY FROM OCCUPYING NON-NAVIGABLE AIRSPACE OVER PRIVATE PROPERTY DURING PEACETIME WITHOUT THE OWNER'S CONSENT IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

The Third Amendment to the United States Constitution provides that: "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III. The "philosophical underpinnings" of the Third Amendment empower the federal courts to limit military operations in peacetime and to entertain claims of judicially cognizable

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military airspace system (over one million square miles and growing) is constantly in flux and rapidly expanding nationwide. It has not remotely approached a state of completion that would exempt the ANG and FAA from conducting a programmatic EIS. Airspace allocation decisions remain open to revision because they do not require physical construction. Instead, boundaries in airspace can be shifted by merely redrawing aviation charts if necessary. It is not too late to hold the ANG and FAA to their NEPA obligations.

injury from military intrusion into the civilian sector. *Laird v. Tatum*, 408 U.S. 1, 15-16 (1972). "[I]t is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Id.* at 20 (Douglas J., dissenting) (citations omitted).

Petitioners' rights in their homes, and thus their rights to resist military occupancy, extend beyond structures alone. "[P]roperty-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others." *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (broadly interpreting the term "home" in the Third Amendment to include property rights protected by the Fourth Amendment).

It is well-settled under the Fifth Amendment that a "taking" occurs when the government appropriates a private party's property interests in the airspace above its property. *See United States v. Causby*, 328 U.S. 256, 264 (1946) ("[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."); *Brown v. United States*, 73 F.3d 1100, 1105 (Fed. Cir. 1996) ("the Government does not have the right to declare itself a co-tenant-in-possession [of the airspace above a citizen's property]") (citations omitted). This Court in *Causby* emphasized that the government had not "merely destroyed property [with its overflights but was] using a part of it for the flight of its planes." *Causby*, 328 U.S. at 262-63. n. 7.

The Tenth Circuit's holding that "it is not reasonable to expect privacy from the lawful operation of military aircraft in public navigable airspace," A-39, is inapplicable to Petitioners' challenge to the CAI because the CAI allocates non-public, non-navigable airspace for military

use. A concern raised during the hearings on the Federal Aviation Act was the possibility of a flood of lawsuits under the Fifth Amendment for takings of airspace above civilian property by the military. *See* Statement of A.B. McMullen, A-150-52. To address this concern, Congress added the word "navigable" to the Act and then defined "navigable airspace" as "airspace above the minimum altitudes of flight prescribed by regulations . . . including airspace needed to ensure safety in the takeoff and landing of aircraft." *See* 49 U.S.C. § 40102(a)(30).

Under the Federal Aviation Act, only the FAA, a civilian agency, has the authority to establish regulations implementing the statute and to set the minimum altitude of navigable airspace. 49 U.S.C. § 40103(b). Pursuant to that authority, the FAA has set minimum flight altitudes at 1,000 feet over congested areas, 500 feet over non-congested areas, and 500 feet from any person, vehicle, vessel or structure. 14 C.F.R. § 91.119(a)-(c). Aircraft may *never* fly below an altitude sufficient to ensure a safe emergency landing. *Id.* The airspace within 500 feet of a person's home is by definition non-navigable, and thereby not public. Each time military pilots fly less than 500 feet from a house or other structure, they are physically placing themselves in that person's private property.

When the FAA charted CAI airspace as low as 300 feet, it opened the door to military use of private property without consent. Despite promises to the contrary, the military can and does use this Special Use Airspace at its minimum charted altitudes, dependent only on the military's own determination as to whether national emergency or special training requirements justify such use. But Petitioners' constitutional right of freedom from military occupation of private property cannot be trumped by the military's declaration of need. The Third Amendment prevents that very situation.

The invasion of Petitioners' property by ANG overflights goes beyond the physical presence of the planes themselves. Under *Engblom*, Third Amendment protections extend at least as far as Fourth Amendment protections, and the Fourth Amendment is violated when overflights "pry into or enter private homes or their curtilage" and such "prying" is accomplished by "repeated buzzings" that "at best disturb, and at worst terrorize, the hapless residents below." *NORML v. Mullen*, 608 F. Supp. 945, 957 (N.D. Cal. 1985); *see also Florida v. Riley*, 488 U.S. 445, 452 (1989) (the presence of "undue noise" affected the Court's determination of the constitutionality of a police overflight). During military overflights, walls shake, people are unable to sleep, carry on a conversation or talk on the phone. The vibration and noise caused by military overflights regularly enters members' homes and interferes with members' use and enjoyment of their property. This, in itself, amounts to occupancy, or "quartering," in violation of the Third Amendment.

This Court recently recognized that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 121 S. Ct. 2038, 2043 (2001). The same is true with the Third Amendment. Indeed, limiting the scope of the Third Amendment to instances in which individuals are required to take in infantry soldiers as boarders in their homes would put private individuals "at the mercy of advancing technology" by the military. *See Kyllo*, 121 S. Ct. at 2044. At least one federal court has found such a limited application of the Third Amendment to be impractical in modern times:

> Can it be the Third Amendment protects the United States citizens against deprivation of property through deployment of infantry but

> provides obstacles to any remedy for damages done by million dollar airplanes?

Arnhold v. United States, No. 88-0934C(3), 1989 U.S. Dist. LEXIS 17904 at *6 (E.D. Mo. June 13, 1989) (finding the United States liable for a constitutional tort under the Third Amendment where the vibrations from low-level overflights physically invaded plaintiff's home).

The Tenth Circuit refused to consider this claim, and instead held that citizens have no constitutional recourse when the military conducts training activities in non-navigable airspace as near as 300 feet from their homes. That interpretation of the Third Amendment is archaic and unreasonable and warrants review by this Court.

CONCLUSION

For the reasons set forth above, petitioners Custer County Action Association et al. respectfully request that this Court grant the Petition for Writ of Certiorari and provide such other relief that may be appropriate under the circumstances.

Dated: October 17, 2001

Respectfully submitted,

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TABLE OF CONTENTS

Custer County Action Association v. Garvey, 256 F.3d 1024 (10th Cir. 2001).....A-1

Federal Aviation Administration Record of Decision for the Adoption of the Colorado Airspace Initiative Prepared by the National Guard, 64 Fed. Reg. 54721 (Oct. 7, 1999) A-41

Air National Guard Record of Decision for the Colorado Airspace Initiative (Oct. 28, 1997) A-59

Constitutional, Statutory and Regulatory Provisions Involved.....A-92

Excerpts from FAA Order 7400.2D, *Procedures for Handling Airspace Matters* (Sept. 16, 1993) A-104

Excerpts from FAA Order 7610.4J, *Special Military Operations* (Nov. 3, 1998).....A-125

Excerpts from Statement of Dr. Leslie A. Bryan, Chairman of the General Aviation Facilities Planning Group, The Federal Aviation Act: *Hearing on H.R. 12616 Before the House Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce*, 85th Cong. 167-169 (1958).....A-137

Excerpts from Statement of A.B. McMullen, Executive Director of the National Association of State Aviation Officials, *The Federal Aviation Act: Hearing on H.R. 12616 Before the House Subcomm. on Transportation and Commerce of the Comm. on Interstate and Foreign Commerce*, 85th Cong. 230, 232-236, 240 (1958) A-144

TABLE OF CONTENTS – Continued

H.R. Conference Report No. 2556 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3767 ..... A-157

Map of Existing and Proposed Military Operations Areas and Military Training Routes in the United States, updating information originally found in *Air National Guard: Long Range Airspace Planning* (Jan. 1992)..... A-168

Executive Summary from *Air National Guard: Long Range Airspace Planning* (Jan. 1992)..... A-169

Colorado Airspace Initiative Working Committee Recommendations (May 1994)..... A-194

State of Colorado Joint Senate Resolution 98-010: Concerning the Impact of the Colorado Airspace Initiative..... A-206

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CUSTER COUNTY ACTION ASSOCIATION; NATIONAL AIRSPACE COALITION; OPEN SPACE ALLIANCE; THE WILDERNESS SOCIETY; BOARD OF DIRECTORS OF MOFFAT CONSOLIDATED SCHOOL DISTRICT NO. 2; CUSTER COUNTY AIRPORT AUTHORITY; FREMONT COUNTY AIRPORT; THE BOARD OF THE TOWN OF CRESTONE; THE BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY; THE BOARD OF COUNTY COMMISSIONERS OF FREMONT COUNTY, COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF SAGUACHE COUNTY, COLORADO; THE SPIRITUAL LIFE INSTITUTE; LA VETA PEACE OF AIR ALLIANCE; CRESTONE MOFFAT BUSINESS ASSOCIATION; HUERFANO VALLEY CITIZENS ALLIANCE; RURAL ALLIANCE FOR MILITARY ACCOUNTABILITY; WOLF SPRINGS RANCHES, INC.; THE HISTORIC PINES RANCH; CUSTER COUNTY BISON; KAREN G. WORONOFF; DAVID S. WORONOFF,

Petitioners,

No. 99-9543

(Filed July 19, 2001)

v.

JANE F. GARVEY, as Administrator of the FEDERAL AVIATION ADMINISTRATION; and UNITED STATES AIR FORCE MAJOR GENERAL PAUL A. WEAVER, Jr., as Director of the AIR NATIONAL GUARD,

Respondents.

Appeal from the Federal Aviaton Administration and the Air National Guard

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Brian B. O'Neill (Michael A. Ponto, Elizabeth H. Schmiesing, and Michael D. Beach of Faegre & Benson LLP, Minneapolis, Minnesota; and Colin C. Deihl of Faegre & Benson LLP, Denver, Colorado, with him on the briefs) of Faegre & Benson LLP, Minneapolis, Minnesota, for Petitioners.

Ronald M. Spritzer (Lois J. Schiffer, Assistant Attorney General; M. Alice Thurston, Department of Justice; Hans I.E. Bjornson, Federal Aviation Administration; and Randy Chambers, National Guard Bureau, with him on the brief), Department of Justice, Washington, D.C., for Respondents.

Before **SEYMOUR**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **BROWN**,* District Judge.

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* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

BRORBY, Senior Circuit Judge.

Petitioners ask us to reverse the Federal Aviation Administration's (FAA) and Air National Guard's (ANG) orders approving the Colorado Airspace Initiative (Initiative) and finding adequate the Final Environmental Impact Statement on the Initiative. They claim the orders approving the Initiative and the underlying environmental impact analysis violate the Federal Aviation Act, 49 U.S.C. § 40103(b)(3), and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(e). Petitioners further claim implementation of the Initiative will violate their property rights under the Third and Fifth Amendments to the United States Constitution.

We exercise jurisdiction over the FAA's final order pursuant to 49 U.S.C. § 46110. *National Parks & Conservation Ass'n v. Federal Aviation Admin.*, 998 F.2d 1523, 1528-29 (10th Cir. 1993) supports extending our review to the ANG's decision and final environmental impact statement as incorporated into the FAA's final decision. Having carefully reviewed the administrative record,[1] and for

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[1] Petitioners have requested to supplement the administrative record with numerous additional documents, including affidavits, newspaper articles, U.S. Census Bureau population estimates, and a "preliminary Draft" of a "Generic Environmental Impact Statement for Air Force Low Altitude Flying Operations." Respondents oppose this request, except as to the tape and transcript attached to the Affidavit of Elizabeth A. Boike, which they agree represents an accurate transcription

the reasons set forth below, we deny the Petition for Review.

BACKGROUND

This dispute was triggered by the Colorado Airspace Initiative – proposed special use airspace changes to the National Airspace System designed to: (1) provide the necessary airspace for the 140th Tactical Fighter Wing of the Colorado ANG to be able to train with the F-16 fighter jet under realistic conditions; and (2) respond to changes in commercial aircraft arrival and departure

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of a meeting that was part of the administrative process.

Judicial review of an agency decision is generally limited to review of the administrative record. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *accord Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 433 n.7 (10th Cir. 1996). The circumstances which warrant consideration of extra-record materials are "extremely limited." *American Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) (listing possible justifications as: (1) the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) the agency considered factors that were left out of the formal record; (4) the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) evidence coming into existence after the agency acted demonstrates the actions were right or wrong), *cert. denied*, 476 U.S. 1158 (1986). The narrow conditions warranting an exception to the general rule are not present in this case. Accordingly, we deny Petitioners' motion to supplement the record, except for the unopposed affidavit of Elizabeth A. Boike.

corridors required for operation of Denver International Airport.

The Colorado ANG is under the command and control of the Governor of Colorado and is also a reserve component of the United States Air Force. ANG units have increased as a percentage of the total military force and thus have assumed a more prominent role in our national defense. For example, the 140th Air Wing has assisted in Operation Northern Watch, enforcing the no-fly zone in northern Iraq, Operation Southern Watch, enforcing the no-fly zone in southern Iraq, and in operation Coronet Night Hawk, intercepting drug runners from Colombia. The Air Force provides the F-16 fighter and other weapon systems to the ANG. Those systems must be maintained and utilized pursuant to Air Force and Department of Defense regulations. 32 U.S.C. § 701, *et seq.* The ANG's need for frequent, realistic training exercises using these systems is obvious.

ANG pilots utilize three types of airspace in conducting their training exercises: Military Training Routes (MTRs),[2] Military Operations Areas (MOAs),[3] and

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[2] "A MTR is a long, low-altitude corridor that serves as a flight path to a particular destination. A standard MTR usually ranges from 500 feet to 1,500 feet above ground level." "MTRs are designed to provide military pilots with training routes to practice navigational skills over a variety of terrain types and provide access to MOAs, air-to-ground gunnery ranges, and other destinations."

[3] "MOAs are larger expanses of airspace designed to accommodate a wide variety of nonhazardous military flight training maneuvers. The size of a MOA depends on the types of

Restricted Areas (RAs).[4] As finally approved, the Initiative involved a total of fourteen modifications to MTR and MOA airspace in Colorado. The FAA groups these modifications into four actions:

> 1. Kit Carson MOA – This has been renamed the Cheyenne MOA. It retains roughly the same dimensions as the Kit Carson MOA, except that the FAA directed that the western boundary be shortened approximately 10 nautical miles in order to accommodate new approaches to the Denver International Airport. The minimum flying altitude was raised from 100 feet to 300 feet above ground level.
>
> 2. Pinon Canyon MOA and Two Buttes MOA – This is the most significant change found in the [Initiative]. While the Pinon Canyon MOA was already in existence, the Two Buttes MOA is new. The Two Buttes MOA abuts the eastern edge of the Pinon Canyon MOA to create one large MOA. The Two Buttes MOA is large enough to handle F-16 fighters engaged in air-to-air combat training missions. The Pinon Canyon MOA is used primarily for close-air-support training.

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air maneuvers that occur within the MOA. The maximum altitude for a MOA is 17,999 feet above mean sea level. MOAs are not created to prevent access by other aircraft, but rather to show civil aircraft pilots where nonhazardous military flight training may be taking place." "MOAs are typically only scheduled a few hours a day and are not in continuous daily use."

[4] "A RA is usually reserved for training involving either ground- or air-based weapons. These areas are restricted to ensure the safety of aircraft – both military and civilian – not participating in the training exercise."

> 3. Fremont MOA – This MOA was divided into three parts, named the Airburst A, B, and C MOAs. The original MOA was enlarged at some points and reduced at others. The modifications allow more realistic training opportunities for aircraft utilizing the existing Airburst range. That portion of the Airburst MOA that leads to the Airburst Range has a minimum altitude of 500 ft. above ground level. . . . The minimum altitude of the rest of Airburst MOA will remain the same as when it was the Fremont MOA, 1,500 ft. [above ground level].
>
> 4. MTRs into, out of, and through MOAs – All other airspace modifications within the [Initiative] address how aircraft are to get to and from the MOAs listed above. The previous MTRs had no minimum altitude restrictions. Under the [Initiative], all MTRs will be raised to either 300 feet or 500 feet above ground level. A number of MTRs were narrowed by the FAA as part of its environmental mitigation.

According to the FAA,

> [t]he remaining MOA, La Veta, is unchanged from its previous use, except the FAA deleted a small portion for the benefit of the Fremont County Airport. Although some of the [Initiative] airspace is charted down to 300 feet above ground level, that airspace will not be flown lower than 500 feet [above ground level] 'expect [sic] in national emergencies or [for] special training requirements.' "

The ANG issued its record of decision adopting the above-referenced changes, identified as the "preferred alternative" in the Final Environmental Impact Statement, in October 1997. 62 Fed. Reg. 60487 (Nov. 10 1997). In

October 1999, the FAA issued a final order (1) adopting the Final Environmental Impact Statement the ANG prepared on the Initiative, and (2) directing that the requested Special Use Airspace changes to the National Airspace System identified as the preferred alternative in the Final Environmental Impact Statement be implemented. 64 Fed. Reg. 54721 (Oct. 7, 1999). Petitioners filed their Joint Petition for Review of the ANG and FAA orders in November 1999.

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. § 706, governs our review of the ANG's[5] and FAA's final decisions. *See Arapahoe County Pub. Airport Auth. v. Federal Aviation Admin.*, 242 F.3d 1213, 1218 (10th Cir. 2001). We will set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[6] In determining whether an agency's decision is arbitrary or capricious, we "must

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[5] The Department of Defense, including the Airforce and KNG [sic], is not excepted from National Environmental Policy Act requirements. *See Jackson County v. Jones*, 571 F.2d 1004, 1007 (8th Cir. 1978).

[6] More specifically, a reviewing court may set aside an agency determination pursuant to 5 U.S.C. § 706(2) if it is (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence; or (f) unwarranted by the facts to the extent they are subject to de novo review. 5 U.S.C. § 706(2); *see Lewis v. Babbitt*, 998 F.2d 880, 881-82 (10th Cir. 1993).

consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quotation marks and citation omitted).

The agencies' findings of fact are conclusive if supported by substantial evidence. 49 U.S.C. § 46110(c); *see also Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). The substantial-evidence standard does not allow us to displace the agencies' " 'choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' " *Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1218 (quoting *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1231).

We review Petitioners' constitutional claims de novo. *See Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999).

ANALYSIS

Petitioners raise an indiscriminate number of statutory and constitutional challenges to the ANG and FAA decisions approving the Initiative. First, they claim the FAA violated the Federal Aviation Act, 49 U.S.C. § 40103(b)(3)(A), FAA regulations and the Administrative Procedure Act

> by implementing the [Initiative]: (a) without determining whether the Initiative is necessary in the interest of national defense; (b) without

> record evidence to support such a conclusion; (c) in the face of substantial evidence that the Initiative is not necessary in the interest of national defense; (d) without accurate information with which it could determine whether the ANG has been using the minimum amount of airspace necessary; and by unlawfully delegating its authority to set minimum altitudes of flight to the military[.]

Second, Petitioners claim the ANG and FAA violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500.1-1508.28,

> by adopting an [Environmental Impact Statement] that: (a) fails to adequately analyze the noise impacts of the Initiative; (b) omits analysis of the cumulative impacts of the [Initiative] and other airspace use in the region; (c) omits analysis of the impacts of military overflights on Wilderness Areas, proposed wilderness, national monuments, and proposed national parks; (d) omits analysis of the nationwide impacts of military airspace proliferation; (e) fails to accurately and adequately analyze socio-economic and growth-related impacts; and (f) fails to consider reasonable alternatives[.]

Finally, Petitioners argue the ANG and FAA violated the Fifth Amendment of the United States Constitution by taking Petitioners' property interests without due process of law, and violated the Third Amendment by appropriating Petitioners' property interests and invading Petitioners' privacy for military purposes during peacetime without their consent. We address each claim in turn.

Federal Aviation Act Claims

Justiciability

The FAA asserts its decision the Initiative is necessary in the interest of national defense, made in consultation with the Department of Defense, is not subject to judicial review, "because it is a political question committed by the Constitution to the legislative and executive branches of government." Whether the political question doctrine restricts our review of this matter is a question of law we determine de novo. *See Adkins v. United States*, 68 F.3d 1317, 1322 (Fed. Cir. 1995).

The political question doctrine employs separation of powers principles to restrict the justiciability of certain issues. *See Aktepe v. United States*, 105 F.3d 1400, 1402-03 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998). Matters closely related to foreign policy and national security, for example, "are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Similarly, courts afford the political branches of government a particularly high degree of deference in the area of military affairs, because the Constitution expressly confers authority over the military on the executive and legislative branches. *Aktepe*, 105 F.3d at 1403 (citing U.S. Const. art. I, § 8, cls. 11-16; U.S. Const. art. II, § 2); *Clark v. Widnall*, 51 F.3d 917, 921 (10th Cir. 1995). We do not hesitate, however, to review military action (1) to determine whether military officials have acted within the scope of their powers, (2) to determine whether military officials violated their own regulations, (3) to evaluate the constitutionality of statutes pertaining to the military, or

(4) to evaluate the constitutionality of court-martial convictions and selective service induction procedures. *Clark*, 51 F.3d at 921; *see also Mindes v. Seaman*, 453 F.2d 197, 200-01 (5th Cir. 1971).

We recognize the action at issue here technically is not military action. The FAA is a civilian agency. By statute, however, the FAA is instructed to determine whether airspace is necessary to national defense in consultation with the Defense Department. 49 U.S.C. § 40103(b)(3). Under these circumstances, we believe the political question doctrine precludes us from second-guessing or interfering with the FAA's decision the Initiative is necessary to provide airspace for military training. *See Gilligan v. Morgan*, 413 U.S. 1, 5-11 (1973) (holding issues of National Guard training and weaponry are essentially professional military judgments within the constitutionally vested responsibility of the legislative and executive branches, and outside the courts' competence). However, we are free to review whether, in making that decision, the FAA acted within the scope of its powers, followed its own regulations, and complied with the Constitution. *Clark*, 51 F.3d at 921. We proceed, then, to evaluate Petitioners' claims to the extent they raise issues within these permissible review parameters.[7]

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[7] While phrased as questions of administrative law, Petitioners' claims (1) no record evidence supports a decision the Initiative is necessary for national defense, (2) substantial evidence exists to show the Initiative is not necessary for national defense, and (3) the FAA used inaccurate information concerning the minimum amount of airspace necessary for ANG training, in truth attack the substance of the FAA's necessity determination. Petitioners really are asking this court

Findings of Necessity

Petitioners claim the FAA violated the Federal Aviation Act by failing to determine whether the Initiative is necessary in the interest of national defense. Petitioners are correct that 49 U.S.C. § 40103(b)(3)(A) directs the FAA to establish airspace areas it deems necessary in the interest of national defense. However, they overlook the specific purpose for that determination as set forth in § 40103(b)(3)(B): if, using "available facilities," the Administrator "cannot identify, locate, and control" civil aircraft in those areas deemed necessary for national defense, the Administrator shall restrict or prohibit civil aircraft flight in those areas by regulation or order.

As the FAA points out, by definition, MTRs and MOAs do not restrict or prohibit civil aircraft access. *See supra* notes 2-3 and accompanying text. Arguably then, 49 U.S.C. § 40103(b)(3)(A) does not apply to the FAA's approval of modifications to MTR and MOA airspace in Colorado. However, even if 49 U.S.C. § 40103(b)(3) does apply to some portion of the Initiative as approved by the FAA, nothing in that statute mandates that the FAA make an express finding of necessity. In the absence of a specific statutory directive, the law does not always require an agency to make formal findings. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *cf. Southwestern Bell Mobil* [sic] *Sys., Inc. v. Todd*,

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to conclude the Initiative is not necessary in the interest of national defense. For the reasons stated above, we will not delve into the correctness of that determination.

244 F.3d 51, 59 (1st Cir. 2001) (finding no basis in language of Telecommunications Act to require formal findings of fact and conclusions of law from local zoning board); *AT&T Wireless PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423, 429-30 (4th Cir. 1998) (stating Congress knows how to require formal findings when it so desires as evidenced by Administrative Procedure Act and certain provisions of Telecommunications Act). Moreover, the FAA's approval of the Initiative does not constitute an agency rulemaking or adjudicative action for which the Administrative Procedure Act requires formal findings. *See* 5 U.S.C. §§ 553(a)(2), 554(a). Most important, the record here amply demonstrates the FAA did, in fact, believe the Initiative to be necessary in the interest of national defense, and articulated the reasons why. Petitioners' arguments to the contrary simply are not supported by applicable law or the record.

Limiting Military Airspace

Consistent with the purpose of the Federal Aviation Act to "encourage and allow maximum use of the navigable airspace by civil aircraft," 49 U.S.C. § 40103(b)(3), the FAA is instructed to minimize the amount of airspace designated as special use airspace and to limit military airspace to the area actually needed for training. *See e.g.*, FAA Order 7610.4J ¶ 9-1-4 (stating that special use airspace designations "shall be limited to the minimum number of areas necessary," and special use area activation "shall be limited to the minimum area, altitude, and time required for the activity/mission"). Petitioners argue the FAA violated its own policy. They further assert "the FAA appears to have improperly delegated [its

authority to limit the amount of special use airspace] to the military." The record belies these claims.

The record shows the FAA reduced the special use airspace the ANG initially requested. Some reductions were incorporated at the FAA's request prior to the ANG issuing its record of decision. Others were incorporated as the FAA formally reviewed the ANG record of decision and National Environmental Policy Act documents. The FAA further restricted the hours military training could take place within the special use areas. This evidence that the FAA independently reviewed and modified the Initiative consistent with established FAA policy to minimize the area, altitude and time allotted to military training defeats Petitioners' unsubstantial claims the agency violated that policy and improperly delegated its authority.[8]

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[8] In a related argument, Petitioners assert the FAA failed to keep factual data on the ANG's Colorado airspace usage. Petitioners believe the FAA improperly deferred to the ANG's inaccurate sortie counts – "[a] sortie consists of the take-off, all the training events performed while in flight, and landing of a single aircraft" – which made "the Initiative falsely appear to be the 'environmentally preferred alternative.' " According to Petitioners, this "reliance . . . on conjecture rather than factual data renders any 'implicit' determination that the Initiative contains the minimum areas and airspace use necessary entirely unreliable, in violation of FAA regulations."

In support of these allegations, Petitioners cite two documents – an informal, undated memo to "Doug" from "Kent" regarding ANG flying hours, and a table of 1992-93 baseline sortie data. These isolated references to the use of estimations or averages to quantify certain subsets of special uses (*i.e.*, sorties and MTRs) for certain years (FY 91, FY 93, FY 94), without any context to determine if or how the FAA used this information, simply do not support the proposition that the

Minimum Flight Altitudes

Minimum safe altitudes are established by regulation. 14 C.F.R. § 91.119. The general flight rule regulation specifically proscribes the operation of aircraft "closer than 500 feet to any person, vessel, vehicle, or structure" over open water or sparsely populated areas; the operation of aircraft closer than 500 feet above the surface in areas other than congested areas; and the operation of aircraft below "an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft" over "any congested area of a city, town or settlement, or over any open air assembly of persons." 14 C.F.R. §§ 91.119(b), (c). The Final Environmental Impact Statement indicates low altitude airspace within the Initiative will "be charted to 300 feet above ground level, but not flown lower than 500 feet above ground level except in national emergencies or special training requirements." Petitioners cite this statement as evidence the FAA violated its own regulations by charting airspace below the minimum altitudes prescribed by 14 C.F.R. § 91.119. Citing FAA Order 7610.4J ¶ 11-4-3, Petitioners further claim the FAA has unlawfully delegated its power to define minimum safe altitudes to the military. Neither claim withstands scrutiny.

FAA utterly failed to monitor the ANG's use of Colorado airspace in accordance with FAA regulations and established policy.

It is more accurate to characterize Petitioners' complaints regarding the sortie data as a challenge to the adequacy of the Final Environmental Impact Statement. To the extent the baseline sortie data is relevant to Petitioners' National Environmental Policy Act claims, it is discussed *infra*.

First, as Respondents correctly point out, 14 C.F.R. § 91.119 does not set an absolute minimum altitude of 500 feet. Indeed, the regulation specifies no minimum altitude for flight over open water or sparsely populated areas so long as the aircraft is no "closer than 500 feet to any person, vessel, vehicle, or structure." 14 C.F.R. § 91.119(c). Most MOAs and MTRs are located in sparsely populated areas, thus allowing a military pilot to fly below an altitude of 500 feet in a remote MTR or MOA and still be within navigable airspace, under the conditions permitted by the regulation.

Second, we agree with Respondents this is not the appropriate time or place for Petitioners to challenge the legality of FAA Order 7610.4J, which addresses all "Special Military Operations," and is not specifically related to the FAA's approval of the Initiative. We also agree with Respondents that to the extent FAA Order 7610.4J permits the military to establish appropriate altitudes, it does so under very narrow circumstances and does not constitute the wholesale abrogation of authority Petitioners suggest. Contrary to granting blanket permission to the military to disregard minimum safe altitude regulations, Order 7610.4J holds military pilots responsible for adhering to the provisions of 14 C.F.R. § 91.119 when flying instrument rule ("IR") and visual flight rule ("VFR") routes. FAA Order 7610.4J ¶¶ 11-6-7, 11-7-3(c). Only in the event of an aircraft systems failure may the military establish an altitude suitable for flight in instrument meteorological conditions (the IFR altitude) "contrary to 14 C.F.R. [§] 91.119." FAA Order 7610.4J ¶ 11-4-3.b. "In no case will flight operations be conducted at altitudes less than those specified in 14 C.F.R. § 91.177 [Minimum altitudes for IFR

operations.]." *Id.* These circumstances provide no basis for setting aside the FAA's decision approving the Initiative.

Finally, notwithstanding Congress' general intent that a civilian agency – the FAA – regulate navigable airspace, *see* 49 U.S.C. § 40103(b), Congress expressly gave the FAA broad authority to grant exemptions from safety regulations, including minimum safe altitudes, "when the Administrator decides the exemption is in the public interest." 49 U.S.C. § 40109(b). Petitioners have failed to show how the FAA has exceeded that authority if indeed it has exempted the ANG from the general minimum altitude requirements.

For all these reasons, within the limited permissible scope of appellate review, we conclude the FAA has not violated the Federal Aviation Act, FAA regulations or the Administrative Procedure Act by approving the Initiative.

National Environmental Policy Act Claims

As we have stated on numerous occasions, the National Environmental Policy Act "prescribes the necessary process" by which agencies must take a "hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific

information;"[9] it "does not mandate particular results." *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1171-72 (10th Cir. 1999) (quotation marks and citations omitted); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521-22 (10th Cir. 1992). In other words, the National Environmental Policy Act " 'prohibits uninformed – rather than unwise – agency action.' " *Colorado Envtl. Coalition*, 185 F.3d at 1172 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

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[9] The National Environmental Policy Act directs all federal agencies to:

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (listing the requirements for an environmental impact statement); *see also* 40 C.F.R. § 1500 *et seq.* (Council on Environmental Quality regulations expanding upon the appropriate form and content of an environmental impact statement.)

Petitioners' National Environmental Policy Act claims generally attack the adequacy of the Final Environmental Impact Statement, prepared by the ANG and adopted by the FAA.[10] Consistent with the intended purpose of the Act to prescribe a process by which agencies can make informed decisions, when we review the adequacy of a final environmental impact statement

> we merely examine "whether there is a reasonable, good faith, objective presentation of the topics [the National Environmental Policy Act] requires an [environmental impact statement] to cover." *Holy Cross,* 960 F.2d at 1522 (quotation marks and citation omitted). Our objective is not to "fly speck" the environmental impact statement, but rather, to make a "pragmatic judgment whether the [environmental impact statement]'s form, content and preparation foster both informed decision-making and informed public participation." *Oregon Envtl. Council v. Kunzman,* 817 F.2d 484, 492 (9th Cir. 1987) (quotation marks and citation omitted).

Colorado Envtl. Coalition, 185 F.3d at 1172.

Impact Analysis

"An environmental impact statement must analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of 'past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes

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[10] "An agency may adopt a Federal draft or final environmental impact statement . . . provided that the statement . . . meets the standards for an adequate statement under [the Council on Environmental Quality] regulations." 40 C.F.R. § 1506.3(a).

such other actions.' " *Id.* at 1176 (quoting 40 C.F.R. § 1508.7); *see also* 40 C.F.R. §§ 1508.8 (including ecological, aesthetic, historical, cultural, economic, social and health impacts) and 1508.25(a)(2), (c). Petitioners claim the environmental impact statement studying the Initiative failed to adequately address noise impacts; the cumulative impacts of all U.S. military, foreign military and non-military overflights; impacts to existing and proposed wilderness areas and national parks; the nationwide impacts of low-level military aircraft operations; and the socioeconomic impacts of overflights. We examine the merits of each of these claims, combining our discussion of the cumulative and nationwide impacts.

Noise

Petitioners assert the ANG employed a flawed methodology that resulted in severely understated noise impacts. They support this claim, in part, with a collection of comments from United States Air Force noise analyses unrelated to the Initiative, including a 1987 Environmental Noise Assessment for Aircraft Training Routes and a December 1990 "Preliminary Draft" of a "Generic Environmental Impact Statement for Air Force Low Altitude Flying Operations."[11]

The administrative record establishes that the ANG and FAA performed a detailed analysis of the Initiative's potential noise impacts, using the Onset Rate Adjusted

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[11] The Air Force never adopted this latter document as final. Moreover, it is not a part of the administrative record in this case.

Monthly Day-Night Average Sound Level methodology – a cumulative sound metric that accounts for the sound level, duration, and frequency of noise producing events, and is "generally designed to determine the potential of noise to interfere with human activity." *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 577 n.2 (9th Cir. 1998). The agencies also employed the "sound exposure level" (SEL) metric to represent the intensity and duration (*i.e.*, sound impact) of a specific noise event such as a single aircraft overflight. The Final Environmental Impact Statement illustrates that these particular methodologies are well-established and widely accepted.

It is true, not all commenters agreed with the ANG's and FAA's methodology or conclusion the Initiative would result in no significant noise impact. The Final Environmental Impact Statement considered these comments and incorporated them into the final analysis. For example, the agencies responded to concerns over using a sixty-five decibel noise threshold in rural areas by lowering that threshold to fifty-five decibels in certain areas and by expanding the noise criteria used to evaluate impacts in each affected area. The Final Environmental Impact Statement also included a discussion of the concept of natural quiet as a resource, additional information concerning the relative noise impacts in rural settings, and maps displaying noise contours for airspace impacted by the Initiative. The conclusions reached in the Final Environmental Impact Statement are based on data gathered by, and the reasoned opinions of, recognized experts. As we have stated before, "agencies are entitled to rely on their own experts so long as their decisions are

not arbitrary and capricious." *Colorado Envtl. Coalition*, 185 F.3d at 1173 n.12; *see also Morongo Band of Mission Indians*, 161 F.3d at 577; *City of Bridgeton v. Federal Aviation Admin.*, 212 F.3d 448, 459 (8th Cir. 2000) (recognizing, in upholding FAA's noise methodology used to analyze impacts of proposed airport expansion, "[t]he agency, not a reviewing court, is entrusted with the responsibility of considering the various modes of scientific evaluation and theory and choosing the one appropriate for the given circumstances" (quotation marks and citations omitted)), *cert. denied*, 121 S.Ct. 855 (2001).

As so often is the case in disputes concerning the potential environmental impacts of a project, Petitioners' claim boils down to a disagreement over scientific opinions and conclusions. While we appreciate Petitioners' concerns over noise impacts, and do not ignore the fact contradictory evidence and data may well exist, "the mere presence of contradictory evidence does not invalidate the [a]gencies' actions or decisions." *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1241. We cannot displace the agencies' choice between two conflicting views, even if we would have made a different choice had the matter been before us de novo. *Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1218. Petitioners' technical objections do not demonstrate the ANG's and FAA's noise impact analysis was unsupported by substantial evidence in the administrative record, inadequate to foster informed public participation and decision-making, or otherwise arbitrary and capricious. Nor do the objections support Petitioners' belated argument that a Supplemental Environmental Impact Statement is necessary. This claim therefore provides no basis for setting aside the Final

Environmental Impact Statement. *See City of Bridgeton*, 212 F.3d at 460 (citing cases in which courts have upheld the FAA's discretion to choose its noise impact methodology).

Cumulative/Nationwide

Petitioners further challenge the adequacy of the Final Environmental Impact Statement insofar as it addresses cumulative impacts. They argue the ANG and FAA failed to analyze all impacts of both military (domestic and foreign) and non-military overflights in areas affected by the Initiative. In addition, they claim the ANG and FAA were required to prepare a comprehensive, programmatic environmental impact statement "to consider the impact of the nationwide proliferation of military airspace" and low-level military aircraft operations.

While we do not find the cumulative impact analysis to be a model of clarity or thoroughness, the Final Environmental Impact Statement does (1) list anticipated sorties and time spent at each altitude band by the 140th, 27th, and 150th fighter wings, as well as "other" military aircraft; (2) apply the aircraft type and flying altitude data in evaluating the noise impacts; and, perhaps most important, (3) explain why the number of sorties are reasonably considered the key component of the cumulative impact analysis. The Final Environmental Impact Statement further explains how the noise prediction methodology accounts for both Initiative Activity and non-Initiative Activity in each area likely to be affected by the activities in a particular MOA or MTR, and how

the agencies derived and applied a worst-case analysis based on the maximum number of aircraft operations within each region of influence. Commercial and non-military flight activity is neither related to nor dependent on the Initiative – Petitioners make no showing [sic] such activities, and thus any noise impacts from such activities, are likely to increase as a result of the Initiative. As such, those activities need not be analyzed as direct or indirect cumulative impacts caused by the Initiative. *See Allison v. Department of Transp.*, 908 F.2d 1024, 1031 (D.C. Cir. 1990); *C.A.R.E. Now, Inc. v. Federal Aviation Admin.*, 844 F.2d 1569, 1574-75 (11th Cir. 1988). As to the possible impact of more military pilots flying off course (*i.e.*, pilot noncompliance or misconduct), it was noted recent compliance had been "extremely good," and the agencies identified and implemented a mitigation measure to minimize any such impact. The National Environmental Policy Act requires nothing more. *See Park County Resource Council v. United States Dep't of Agric.*, 817 F.2d 609, 621-22 (10th Cir. 1987), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). For these reasons, we hold the cumulative impact analysis in the present case is legally sufficient. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) ("determination of the extent and effect of [cumulative impacts on range of resources], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies").

We further hold the Initiative is not a "connected action," triggering the need for a programmatic or nationwide environmental impact analysis. Put simply, projects

that have "independent utility" are not "connected actions" under 40 C.F.R. § 1508.25(a)(1)(iii). The administrative record makes clear the Initiative has independent utility. The Initiative was designed specifically to provide the necessary airspace for the 140th Tactical Fighter Wing of the Colorado ANG to be able to train with the F-16 fighter jet under realistic conditions, and to make changes in commercial aircraft arrival and departure corridors required for operation of the new Denver International Airport. The record gives no indication, and Petitioners cite no evidence, of a clear nexus between the Initiative and other military airspace proposals across the Nation. In the absence of such evidence, it is neither unwise nor irrational to allow the Initiative to go forward independent of other special use airspace designations or low-level military flight training programs. *See Airport Neighbors Alliance, Inc.*, 90 F.3d at 430-31 (holding no cumulative environmental impact statement was required where no "inextricable nexus" existed between runway upgrade and airport development master plan, and where proposed runway upgrade was independent from other Master Plan components); *see also Morongo Band of Mission Indians*, 161 F.3d at 579-80; 46 Fed. Reg. 18026, 18033 (Mar. 23, 1981) (explaining that an area-wide or overview environmental impact statement is "useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography").

Wilderness Areas, National Monuments and National Parks

Petitioners contend the ANG and FAA failed to adequately analyze the Initiative's impacts on the unique

natural quiet, aesthetic, visual and recreational resources associated with certain wilderness areas, wilderness study areas and proposed national parks underlying or immediately adjacent to the Initiative.[12] They support this claim with comments from the Bureau of Land Management, Department of Interior and other agencies, expressing concern over potential impacts the Initiative might have in these sensitive areas and criticizing the ANG and FAA for not fully analyzing those impacts. According to Petitioners, by approving the Initiative, the ANG and FAA have preemptively destroyed the wilderness qualities in these sensitive areas, and have further preempted the authority of Congress and the President to designate additional sensitive areas as wilderness areas in the future.

We begin by noting that the National Environmental Policy Act requires agencies preparing environmental impact statements to consider and respond to the comments of other agencies, not to agree with them. *See* 40 C.F.R. § 1503.4; *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991). The administrative record demonstrates the ANG and FAA considered the concerns expressed by the public and other agencies

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[12] Petitioners refer specifically to the Great Sand Dunes National Monument, the Florissant Fossil Beds National Monument, the Bent's Old Fort National Monument, the Sangre de Cristo Wilderness, and the Greenhorn Mountains Wilderness. The parties apparently agree the actual and potential monuments, parks and wilderness areas are located beneath or adjacent to the La Veta MOA, Airburst A MOA, VR-413 and IR-409.

regarding potential impacts on wilderness and other sensitive areas prior to concluding any such impacts would be negligible. It is certainly Petitioners' prerogative to disagree with that conclusion. However, their emotional assessment of the Initiative's probable impacts on wilderness areas, national monuments and national parks, and/or the ability to designate and manage additional such areas in the future, does not support a National Environmental Policy Act claim.

The National Environmental Policy Act requires only that the agencies make a reasonable, good faith effort to analyze environmental impacts. The record in this case verifies that the agencies identified possible noise impacts on sensitive areas, including wilderness areas, parks and monuments, and reasonably determined, after considering public and agency comment alike, that any impact on these areas would be insignificant, because (1) low-level military training overflights took place in each of the affected airspaces before the Initiative; (2) even with implementation of the Initiative, none of the affected airspaces would experience cumulative noise levels greater than the 55 dB standard considered ideal by the Environmental Protection Agency; and (3) the ANG adopted specific measures, such as avoiding overflights of wilderness when possible and flying a minimum of 2,000 feet above ground level, to mitigate any impact on sensitive areas. We therefore uphold the ANG's and FAA's environmental impact analysis as it pertains to wilderness areas, national monuments and national parks.

Socioeconomic and Growth

Petitioners argue the socioeconomic data in the Final Environmental Impact Statement is outdated and inaccurate, in violation of 40 C.F.R. §§ 1500.1(b), 1502.24 (requiring agencies to insure the professional and scientific integrity of environmental information). They cite extra-record 1999 census data and Eric J. Nickell, *The Colorado Airspace Initiative and Economic Impacts on Custer, Huerfano and Saguache Counties, Colorado*, June, 1993 (Nickell Study), as primary support for their contention the Initiative's socioeconomic impact will be much greater than that identified in the Final Environmental Impact Statement.

The Final Environmental Impact Statement was published in August 1997. Petitioners can hardly criticize that document for failing to utilize 1999 census data. They have neither argued nor shown the agencies must prepare a supplemental environmental impact statement based on updated census information. *See Colorado Envtl. Coalition*, 185 F.3d at 1177-78 (explaining the National Environmental Policy Act does not "require a supplemental environmental impact statement every time new information comes to light. A supplemental environmental impact statement comes into play only if the new information is sufficient to show [the proposed action] will affect the quality of the human environment in a significant manner or to a significant extent not already considered." (Quotation marks and citations omitted.)). Moreover, the record reveals that both the ANG and the Air Force reviewed the Nickell Study, but discounted it as unreliable. The agencies instead relied on the previously

described noise impact analysis *vis-a-vis* impacts on residential and recreational land use; relevant population, housing, employment and earnings data; and comparative residential valuation data and tourism earnings data in each region of influence. The ANG and FAA are entitled to rely on their own experts so long as their decision was not arbitrary and capricious. *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1241. To repeat, "the mere presence of contradictory evidence does not invalidate the [a]gencies' actions or decisions," *id.*, and we will not displace the ANG's and FAA's choice between conflicting views, *Arapahoe County Pub. Airport Auth.*, 242 F.3d at 1218.

We recognize Petitioners do not agree with the agencies' conclusions concerning the Initiative's potential socioeconomic impacts. However, the agencies' socioeconomic impact analysis is supported by substantial evidence in the administrative record, and was adequate to foster informed public participation and decision-making. The socioeconomic impact analysis is neither arbitrary nor capricious.

Reasonable Alternatives

Petitioners claim the alternatives analysis in the Final Environmental Impact Statement fails in two ways. First, they argue the Final Environmental Impact Statement does not include a "true" no-action alternative; and second, they argue the Final Environmental Impact Statement does not consider other reasonable alternatives.

To comply with the National Environmental Policy Act and its implementing regulations, the ANG and FAA

are required to rigorously explore all reasonable alternatives to the Initiative, including a "no-action" alternative, in comparative form, and give each alternative substantial treatment in the environmental impact statement. *See* 40 C.F.R. §§ 1502.1, 1502.14(a-b), (d); 42 U.S.C. §§ 4332(2)(C)(iii) & (E); *Colorado Envtl. Coalition*, 185 F.3d at 1174. The National Environmental Policy Act does not, however, "require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective. What is required is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Colorado Envtl. Coalition*, 185 F.3d at 1174 (quotation marks and citations omitted). We employ the "rule of reason" to ensure the ANG's Final Environmental Impact Statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable both the ANG and FAA to take a hard look at the environmental impacts of the Initiative and its alternatives, and to make a reasoned decision. *Id.* "The rule of reason guides both the choice of alternatives as well as the extent to which the Environmental Impact Statement must discuss each alternative." *American Rivers v. Federal Energy Reg. Comm'n*, 201 F.3d 1186, 1200 (9th Cir. 1999) (quotation marks and citation omitted).

As to the adequacy of the "no-action alternative," Petitioners claim "the ANG has been unlawfully and increasingly undertaking major federal action that has never been properly subject to environmental review since it began low-level overflights in Colorado decades ago." According to Petitioners, the ANG and FAA inappropriately included this "unlawful activity" in their

assessment of the military's current airspace use, and that a "true" no-action alternative may only reflect the impacts of lawful activity. They further criticize the sortie count data in the no-action alternative, claiming it to be "far in excess of any studied or anticipated in any previous environmental analysis." Petitioners cite no applicable legal or factual authority for these propositions, and apparently misunderstand the intended scope and purpose of a no-action alternative.

In requiring consideration of a no-action alternative, the Council on Environmental Quality intended that agencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo. *See Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997); 46 Fed. Reg. at 18027. In other words, the current level of activity is used as a benchmark. 46 Fed. Reg. at 18027. This is exactly what the ANG and FAA did. The Final Environmental Impact Statement demonstrates the ANG and FAA compared the impacts of the original proposal and preferred alternative to the impacts of continuing to fly in the existing MTRs and MOAs. This is all the law requires. The requirement to consider a no-action alternative does not provide Petitioners a vehicle in which to pursue allegations that past ANG or FAA actions received insufficient environmental analysis. The time has passed to challenge past actions.[13]

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[13] The ANG and FAA did in fact consider the alternative of eliminating the Colorado ANG or existing military airspace in Colorado altogether, but found that alternative to be unreasonable. To the extent Petitioners are attempting to

Turning to the adequacy of the range of alternatives considered, Petitioners claim (1) "unstudied" increases in military airspace use over the last two decades pre-empted consideration of other objectively reasonable alternatives; (2) the three alternatives considered were "nearly identical," thus rendering the analysis "legally inadequate;" and (3) the FAA inappropriately committed resources, and thereby prejudiced the selection of alternatives, before making a final decision. These claims, too, are easily dismissed.

Petitioners' claim that "unstudied" (and therefore "unlawful") increases in military airspace use over the last two decades precluded any rigorous analysis of reduced military use alternatives is really another attempt to challenge the legality of past actions. As stated above, the time has passed for such claims.

The Final Environmental Impact Statement identifies seven alternatives the agencies considered: (1) the original proposal; (2) the preferred alternative; (3) the no-action alternative; (4) the use of other MOAs and MTRs; (5) the elimination of the Colorado Air National Guard; (6) the elimination of existing military airspace in Colorado; and (7) the use of aircraft flight simulators. Applying the rule of reason to the question of whether this was a sufficiently broad/diverse range of alternatives for consideration, we look first to the intended purpose of the proposed action. *See Colorado Envtl. Coalition,* 185 F.3d at 1174-75. The primary purpose of the Initiative is to

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challenge that determination, we consider the issue below in our discussion of the range of alternatives.

develop adequate training opportunities for Colorado ANG pilots within the distance limitations specified by the United States Air Force's training standards. The Final Environmental Impact Statement specifically discusses the training criteria against which each alternative was evaluated, and then explains, in some detail, that alternatives four through seven were eliminated from further detailed consideration after preparation of the Draft Environmental Impact Statement because none "allowed military flying units to meet their total training requirements" – *i.e.*, satisfy the very purpose of the Initiative. The three remaining alternatives, which reflect various military airspace configurations and usage within applicable training criteria parameters, are evaluated and compared throughout the Final Environmental Impact Statement.

The National Environmental Policy Act requires only that reasonable alternatives be evaluated. 42 U.S.C. §§ 4332(2)(C)(iii) and (E); 40 C.F.R. §§ 1502.1, 1502.14(a). Alternatives that do not accomplish the purpose of an action are not reasonable. *Colorado Envtl. Coalition,* 185 F.3d at 1174-76; *see also City of Bridgeton,* 212 F.3d at 456. Petitioners have put forth no record evidence disputing the existence or reasonableness of the United States Air Force training criteria, including the training distance limitations, as applied to the Colorado ANG; nor have they identified an alternative the ANG and FAA failed to consider which satisfies these criteria. Because the administrative record demonstrates the ANG and FAA defined the objectives of the Initiative, identified alternatives that would accomplish those objectives, and took a hard, comparative look at the environmental impacts associated

with each reasonable alternative, Petitioners' challenge to the adequacy of the alternatives analysis fails.

Finally, Petitioners' claim that the FAA implemented the Initiative prior to adopting and approving the Final Environmental Impact Statement is not supported by the record. The FAA documents Petitioners cite as evidence the FAA implemented the Initiative prior to issuing the Record of Decision, make clear no final action would take place on MTR modifications until "any changes dictated by the Environmental Division's on-going environmental review can be addressed as a complete package," and the effective date for the proposed MOA modifications would coincide with the final approval of the proposed MTR modifications.

For all these reasons, we conclude the Final Environmental Impact Statement prepared by the ANG and adopted by the FAA satisfies National Environmental Policy Act standards.

Constitutional Claims

Fifth Amendment

Petitioners ask this court to enjoin implementation of the Initiative, claiming it "results in an unauthorized taking of private property without due process or the prospect of compensation."[14] According to Petitioners, the approved use of the airspace above their properties is "unauthorized" because (1) the Initiative itself is being

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[14] Petitioners expressly disavow making a claim for compensation under the Fifth Amendment. They "seek[ ] only an injunction."

implemented illegally – without a finding that it is necessary to the national defense, where substantial evidence shows that it is in fact contrary to the interest of the national defense, and in the absence of National Environmental Policy Act compliance; (2) the FAA violated its own regulations establishing minimum altitudes of navigation at 500 feet from any person or structure; and (3) the FAA unlawfully delegated its statutory responsibility for setting minimum altitudes of flight to the military.

The Fifth Amendment does not preclude the taking of private property for public use. Rather, it requires the government to justly compensate the private property owner for any authorized taking. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990). Injunctive relief is not available under the Fifth Amendment absent an allegation the purported taking is unauthorized by law. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") "Unauthorized" conduct in the takings context equates to the *ultra vires* actions of an agency, *i.e.*, action explicitly prohibited or outside the normal scope of agency responsibilities. An agency may act within its authority even if its action is later determined to be legally erroneous. *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1523 (D.C. Cir. 1984), *vacated on other grounds by* 471 U.S. 1113 (1985); *Del-Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1362-63 (Fed. Cir. 1998).

Arguably, if a government agency errs, *i.e.*, exceeds its jurisdiction, violates a statute, or acts arbitrarily or

capriciously, it should not be liable for a "taking" under the Fifth Amendment. *See, e.g.*, John D. Echeverria, *Takings and Errors*, 51 Ala. L. Rev. 1047, 1047-48 (2000). We find intriguing the notion that takings involving erroneous government actions cannot be takings for "public use" within the meaning of the Takings Clause, *see id.*; however, we need not debate or decide that issue here. For the reasons stated above, we conclude the Initiative did not violate the Federal Aviation Act, FAA regulations, or the National Environmental Policy Act. Moreover, Petitioners fail to demonstrate the FAA or ANG exceeded their authority under the relevant laws or regulations. Consequently, Petitioners' claim the Initiative constitutes an "unauthorized" or "unlawful" taking cannot stand. *Cf. Preseault*, 494 U.S. at 13 (finding clear statutory authority for agency action giving rise to Fifth Amendment claims, Supreme Court declined to decide what types of official authorization, if any, are necessary to create Fifth Amendment liability, and whether a taking had occurred, instead leaving petitioners to pursue available Tucker Act remedy). Their request for injunctive relief on Fifth Amendment grounds is denied.

Third Amendment

Petitioners insist they have a Third Amendment right "to refuse military aircraft training in airspace within the immediate reaches of their property," and that military overflights occurring in the immediate reaches of their

property during peacetime, and without their consent, "are *per se* unconstitutional."[15] We disagree.

Judicial interpretation of the Third Amendment is nearly nonexistent. The crux of any such claim, however, is whether the nature of the asserted property interest falls "within the ambit of the Third Amendment's proscription against quartering troops 'in any house, without the consent of the Owner.' " *Engblom v. Carey*, 677 F.2d 957, 961-62 (2d Cir. 1982). Citing *Engblom v. Carey*, Petitioners argue that "[b]ecause a private party has rights to the airspace above his or her property . . . the United States military may not appropriate such property interests during peacetime without the property owners' consent." This argument borders on frivolous.

In *Engblom*, the Second Circuit held that "property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others." 677 F.2d at 962. On that basis, and referring to Fourth Amendment "legitimate expectation of privacy" doctrine by analogy, the court reversed the summary dismissal of a Third Amendment claim raised by striking correction officers who, without their consent, were displaced from staff housing by national guard members the State of New

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[15] The Third Amendment to the United States Constitution provides "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. Amend. III.

York brought in to staff the prison. *Id.* at 962-64. According to the majority, the rooms in which the striking correction officers claimed a Third Amendment property interest were, for all intents and purposes, their homes. *Id.* at 963. The striking officers were evicted from those rooms in order to quarter national guardsmen sent to staff the prison during the strike. These facts obviously presented a much closer question than Petitioners present here.

The property Petitioners seek to protect is the airspace above their land. Taken to its logical extreme, Petitioners would have the United States military seek consent from every individual or entity owning property over which military planes might fly, and then design its training exercises to utilize only that airspace for which permission was granted, or else risk Third Amendment liability. We simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners' consent. *See id.* at 966-67 (Kaufman, Circuit Judge, concurring in part and dissenting in part) (summarizing historical origin of Third Amendment). Fourth Amendment principles do not instruct to the contrary. Petitioners' Fourth Amendment rights would be violated only if society is willing to recognize their subjective expectation of privacy in the airspace above their property as reasonable. *See California v. Ciraolo*, 476 U.S. 207, 211-12 (1986). It is not reasonable to expect privacy from the lawful operation of military aircraft in public navigable airspace. *See United States v. Causby*, 328 U.S. 256, 261 (1946) (acknowledging that while a Fifth Amendment remedy might exist if flights

over private property directly and immediately interfere with the enjoyment and use of the land, Congress has declared "[t]he air is a public highway" and "[c]ommon sense revolts at the idea" that aircraft operators would be subject to trespass suits based on common law notions of property ownership extending to the periphery of the universe). Accordingly, Petitioners' Third Amendment claim fails.

CONCLUSION

Because we hold (1) the FAA did not violate the Federal Aviation Act, FAA regulations or the Administrative Procedure Act; (2) the Final Environmental Impact Statement for the Initiative satisfied the National Environmental Policy Act; and (3) Petitioners failed to establish a violation of either the Fifth or Third Amendments to the United States Constitution, we deny the Petition for Review and **AFFIRM** the challenged agency orders.

[Federal Register, Vol. 64, No. 194,
Thursday, October 7, 1999]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Record of Decision for the Adoption of the Colorado Airspace Initiative Prepared by the Air National Guard

AGENCY: Federal Aviation Administration.

ACTION: Record of decision.

SUMMARY: The Federal Aviation Administration (FAA), after carefully reviewing the Final Environmental Impact Statement (FEIS) prepared by the Air National Guard (ANG), announces its decision to adopt the ANG FEIS and implement the requested Special Use Airspace changes to the National Airspace System in and around the state of Colorado. This airspace initiative is known as the Colorado Airspace Initiative (CAI).

FOR FURTHER INFORMATION CONTACT: Elizabeth Graffin, Environmental Specialist, Environmental Programs Division (ATA-300), Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591 (202) 267-3075.

SUPPLEMENTARY INFORMATION: As provided in 40 CFR 1506.3 and FAA Order 1050.ID, "Policies and Procedures for Considering Environmental Impacts," the FEIS of another Federal Agency may be adopted in accordance with the procedures in 40 CFR 1506.3. Under 40 CFR 1506.3(b), if the actions covered by an EIS and the actions proposed by another Federal agency are substantially the

same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. The FAA has determined that the proposed action of modifying existing and establishing new military training airspace areas over the State of Colorado is substantially the same as the actions considered in the ANG's FEIS. FAA staff has independently reviewed the ANG FEIS and has determined that it is current and that the FAA NEPA procedures have been satisfied. FAA has determined that the FEIS adequately assesses and discloses the potential environmental impacts of the proposed action. FAA staff concluded that, after mitigation measures are taken into consideration, the existing airspace can be modified and new military training airspace can be established with no significant impacts on environmental resources.

The ANG has requested this action to respond to changers [sic] in readiness training requirements. The requirements are reflected in specific United States Air Force regulations for military aircraft and personnel operating in the affected airspace. Additionally, this action responds to the changes in commercial aircraft arrival and departure corridors required for operation of the Denver International Airport.

The Text of the entire Record of Decision is provided as follows:

I. Introduction

This document serves as the Record of Decision (ROD) for the Federal Aviation Administration's adoption of the Air National Guard's (AGN) [sic] Final

Environmental Impact Statement (FEIS) and ROD for the proposal known as the "Colorado Air Initiative" (CAI).

Pursuant to Section 102(2) of the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations implementing NEPA procedures (40 CFR Section 1500-1508), the ANG prepared and published a FEIS that analyzed the potential environmental impacts associated with modification of existing airspace and the establishment of new military training airspace in and around the state of Colorado. The document also considered changes in airspace utilization by military flying units.

The FEIS considered three alternatives, the "Preferred Alternative", the "Original Proposal" and the "No Action Alternative" as required by the CEQ regulations. Five other alternatives has [sic] been identified but were eliminated from further consideration.

The ANG has submitted the FEIS along with the supporting aeronautical proposals to the FAA for consideration and adoption pursuant to CEQ regulation 40 CFR Part 1506.3. The proposal submitted by the ANG to the FAA for consideration is the alternative designated by the ANG as the Preferred Alternative. This alternative is also the environmentally preferred alternative. The Preferred Alternative proposes the modification of three existing Military Operating Areas (MOA) and four Military Training Routes (MTR), the deletion of one MTR and a portion of one other, as well as the establishment of one MOA and three MTRs. One MOA would remain unchanged.

The following is a discussion of the proposal submitted to the FAA, a brief discussion of the other alternatives

considered, environmental impacts and additional mitigation measures mandated by the FAA as well as the decision of the FAA.

II. Background

The ANG prepared the CAI FEIS in support of its request for modification to the National Airspace System administered by the FAA. The ANG requested these modifications to address new military airspace training requirements in part related to the modernization of their aircraft and weapons systems. The ANG is also seeking these modifications in response to changes in commercial aircraft arrival and departure corridors dictated by the FAA for the operations of the Denver International Airport.

The ANG issued the CAI FEIS in August 1997 and executed its ROD in October 1997. In the spring of 1998, the ANG submitted these documents to the FAA for adoption pursuant to CEQ guidelines. Thereafter, the ANG submitted its aeronautical proposals to the FAA, formally requesting that the FAA make the requisite changes to the National Airspace System.

The FAA held six informal airspace meetings. In response to many of the comments received as well as to incorporate safety and efficiency requirements, the FAA mandated the additional mitigation measures that are outlined in this document.

III. Proposal

The ANG FEIS analyzed three alternatives, the Preferred Alternative, the Original Proposal, and the No Action Alternative. Implementation of either the Preferred Alternative or the Original proposal would result in a reduction in the number of operations compared to the No Action Alternative (existing conditions). Five other alternatives were originally identified but were not carried forth for consideration. The ANG in its ROD dated October 28, 1997, selected the Preferred Alternative. This alternative was also the environmentally preferred alternative. The following is a discussion of the alternatives considered.

Preferred Alternative

The Preferred Alternative was developed in response to issues and concerns raised during the ANG scoping process. This Alternative took into account comments made by the CAI Working Group and recommendations from former Governor Romer's Office.

The Preferred Alternative proposes the modification of three existing MOAs and four MTRs, the deletion of one MTR and a portion of one other. It also proposes the establishment of one MOA and three MTRs. One MOA would remain unchanged. The proposal considered in the FEIS is as follows:

- Modify Kit Carson A/B MOAs and rename them Cheyenne High and Low MOAs. Minimum altitude would be raised from 100 feet to 300 feet Above Ground Level (AGL).

- Modify Pinon Canyon MOA. The eastern border would be moved approximately 1 nautical mile (NM) to provide FAA clearance criteria for a north-south airway.

- Utilize La Veta MOA. This MOA would remain unchanged.

- Modify Fremont MOA and rename Airburst MOA. The southeastern corner would be extended east and south to connect with the La Veta MOA. The modified airspace would be renamed Airburst A, B and C would form contiguous airspace with the La Veta MOA and the Airburst range. This would exclude an area over Canon City, Colorado and Penrose, Colorado. The bottom elevation of Airburst B and C would be 500 feet AGL.

- Establish Two Buttes MOA. This MOA would be established east of the adjoining Pinon Canyon MOA. The MOA would be divided into low and high areas. The elevation for low would be 300 AGL to 10,000 mean Sea Level (MSL). The elevation for high would be 10,000 MSL but not higher than Flight Level (FL) 180.

- Modify IR-409. The bottom elevation of this MOA would be raised from surface to 300 feet AGL for the two final segments and raised from surface to 500 feet AGL for the remainder of the route. The route width would be reduced from 16 NM to 10 NM along two segments, from 22 NM to 8 NM along one segment and from 16 NM to 6NM for the remainder.

- Delete VR-412.

- Modify VR 413. The floor would be raised from surface to 500 feet AGL. The route width would be reduced to 6 NM. The southwestern

most turning point would be 12 NM along the centerline to eliminate flights over the Great Sands Dune Natonal Monument. Restrictions would be added to the route so that aircraft would remain 2000 feet AGL to the maximum extend [sic] possible when they cross the Sangre de Cristo wilderness areas between Highways 50 and 285.

- Modify IR-414. The minimum altitude would be raised from the surface to 300 feet AGL. The width would be reduced from 28 NM to 6 NM. An existing maneuver area would also be eliminated.

- Establish XIR-424. Create a new MTR that would follow the reverse ground path of IR-414 and then follow the existing ground path of IR-409 to the Airburst Range. The bottom altitude of XIR-424 would be 500 feet AGL from Cottonwood to Airburst Range.

- Modify IR-415. This IR would be modified so that it would join IR-409 at Cedarwood and continue to the Airburst Range. The minimum altitude for this route would be raised from the surface to 300 AGL beginning at Point E near Cedarwood and raised from the surface to 500 feet AGL from Point E to Airburst Range. The width would be reduced from 21 NM to 10 NM and from 33 NM to 10 NM.

- Modify IR-416. The southern portion of this route from Point G to Point L would be deleted. The altitude for the remaining route would be raised from the surface to 300 feet AGL.

- Establish XIR-426. This new MTR would follow the reverse ground path of the current

IR-416 from Point L to Point G. The minimum altitude of this route would be 300 feet AGL.

- Establish XVR-427. This visual route would begin approximately 7 NM south of the northern border of Cheyenne MOA. The route would proceed southwest then north and terminate at Airburst Range. The new VR would conform to the existing IR-409 route widths and altitudes beginning at Point F. The minimum altitudes prior to Point F would be 300 feet AGL.

Original Proposal

This Alternative had been identified by the ANG during its scoping process and was retained for further consideration within the FEIS. Under this Alternative, four existing MOAs and MTRs would be modified, one MTR and a portion of another would be deleted, and one new MOA and three new MTRs would be established. After considering public input received during the scoping process, the ANG determined that the Preferred Alternative was more responsive to the public while ensuring that their training requirements could be accomplished.

No-Action Alternative

Under the No-Action Alternative, existing airspace would continue to be utilized. No modifications to training airspace configuration would occur. However, the operations at the Denver International Airport, since its opening, have placed limitations on the ANG's use of existing airspace. In addition, new modern warfare training requirements mandated by the Air Force necessitated

modification to the existing airspace. The ANG determined that the existing airspace would not enable its pilots to accomplish their training requirements in a manner that would adequately prepare them for wartime taskings. Therefore, this alternative was not considered a viable alternative.

Alternatives Identified But Not Carried Forward For Further Detailed Study

Five other alternatives were originally identified by the ANG but were eliminated from further detailed study. They are as follows: (1) Continued use of the existing MOAs and MTRs aside from those addressed previously and the creation of one MOA and five MTRs. The new MOAs and MTRs were eliminated because they did not meet criteria established for meeting aircrew proficiency requirements or were dismissed by the FAA. (2) Establishment of 6 new MOAs. Each MOA was eliminated from further consideration because it did not meet training or distance from home station requirements. (3) The elimination of the 140th Wing of the COANG. The ANG eliminated this alternative because its evaluations demonstrated economic and logistical advantages associated with individual state ANG units including the 140th Wing. (4) Elimination of military training airspace in the state of Colorado. This alternative would have impaired the ability of pilots stationed in Colorado from accomplishing the required level of training. (5) Replacement of all military aircraft training with simulator assisted training. Although simulator training does assist aircrews in obtaining certain type [sic] of training it does not provide the opportunity to obtain the most important aspect of

aircrew proficiency training, which is the requirement to conduct actual military training flights.

Modification to the Initial Proposal Submitted to the FAA

In addition to the proposals considered in the FEIS and considered as part of the Preferred Alternative, the ANG ROD detailed minor modifications of five MTRs. These modifications had been requested by the FAA stemming from the FAA's on going aeronautical review. They are as follows:

- IR-409. Corridor width narrowed along several legs.
- IR-414. Corridor width narrowed under Cheyenne MOA.
- XIR-424. Corridor width narrowed under Cheyenne MOA.
- IR-416. Corridor width narrowed under Cougar MOA. Southern half of the route would not be eliminated.
- XIR-426. Proposal withdrawn (adoption of the no action alternative)

IV. Environmental Consequences

The ANG, in its FEIS, considered the potential environmental impacts associated with all three of the alternatives carried forth for analysis. The analysis for each piece of airspace was conducted as if the maximum possible numbers of sorties were to be performed in that airspace. The ANG FEIS considered the potential environmental consequences on the following: Noise, Airspace Management/Air Traffic, Land Uses and Resources,

Safety, Visual Resources and Aesthetics, Biological Resources (Vegetation, Wildlife and Domestic Animals and Threatened and Endangered Species), Cultural Resources, Air Quality, Socioeconomic Resources, Earth Resources, Water Resources, Hazardous Material Release, Human Health Effects and Natural Quiet. The EIS also considered the cumulative impacts of the proposal. The ANG ROD concluded the following:

> Based on the analyses conducted for the EIS, neither the Preferred Alternative, the Original Proposal, nor the No-Action Alternative result in significant environmental impacts. Any impacts which may occur can be minimized through the use of mitigation measures." (ANG ROD pg. 8)

V. Mitigation

After the publication of the ANG ROD, the FAA held six informal airspace meetings. From the input received from the public, as well as to assist the FAA in disseminating real time information relating to military training flights to the General Aviation population, the FAA determined that additional mitigation measures were necessary. In addition to the mitigation measures the ANG set forth in its ROD, the FAA mandated the following modifications:

- No operations to occur between the hours of 10:00 P.M. and 7:00 A.M.

- In addition to renaming the Kit Carson A/B, Cheynne, the western boundary would be relocated 10 NM to the east.

- Reduction of Pinon Canyon MOA. The eastern boundary would be modified to coincide with the eastern edge of VR-109 and the western boundary of Two Buttes MOA.

- Airburst A modified. The eastern, southern and western boundaries would be the same as the existing Fremont MOA. The southern boundary would be moved north to avoid Canon City and the Fremont Airport. Altitude would remain the same, i.e., 1500 feet AGL but not higher than FL 180.

- Airburst B modified. The southern boundary of the existing Freemont [sic] MOA would be moved east along the southern boundary of the Fort Carson R-2601. The altitude would be 500 feet AGL but no higher than FL 180.

- Airburst C MOA modified. The southern boundary would be extended south of the Airburst B MOA to highway 50, then west along highway 50 to a point south of Airburst B MOA then north to the southwest corner of the Airburst B MOA. The altitude would be 500 feet AGL, but not higher than 8,500 feet MSL.

- IR-409 modified. Point E would be deleted as an alternative entry/exit point. The existing segment between Point H and Point I would become VR-410/411.

- Creation of VR-410 and VR-411. These MTRs were created in lieu of the expansion of the Airburst MOA extending from R-2601 to the La Veta MOA. VR-410 and VR-411 would be 6 NM wide and would utilize the same centerline as the existing VR-409. VR-410 would be the northbound route and VR-411 the southbound route. The Special Operating Procedures (SOP) for

both routes would require that all operations conducted south of U.S. Highway 50 occur at or above 8,500 feet MSL.

- VR-413 narrowed in the vicinity of the town of Moffat. Route restrictions and reporting requirements added to the route SOP.

- La Veta MOA modified. The northwest tip of this MOA would be removed to accommodate Global Position System (GPS) approach procedures and airspace to the Fremont County Airport.

- Elimination of the Cougar MOA.

The environmental analysis contained within the FEIS was reviewed by the FAA and a determination made that any potential environmental impacts associated with the modifications made to the airspace proposals would be consistent with those already disclosed in the FEIS.

VI. Public Involvement Process

Informal Aeronautical Meetings

In response to public interest in this proposal, the FAA held six informal aeronautical public meetings in 1998. Meetings were held in Saguache, Westcliffe, Penrose, Englewood, Colorado Springs and La Junta, Colorado.

421 comments were received during these informal meetings and many more were submitted in writing after the meetings. The comments were read and characterized. The major issues identified by the public during this process and responses thereto were compiled in a document entitled "Summary of Major Environmental

Comments During FAA Aeronautical Review." This summary was mailed along with the FAA's Federal Register Notice dated April 27, 1999 declaring the Agency's intent to adopt the ANG FEIS to those individuals who had expressed concern about the initiative or who had attended an aeronautical meeting.

Informal Public Comment Period

In a Federal Register Notice dated April 27, 1999, (FR Vol. 64, pg. 22670) the FAA announced that it was recirculating the ANG FEIS in compliance with CEQ regulation 40 CFR Part 1506.3, and that it intended to adopt the FEIS. The Federal Register Notice stated that FAA would receive public comments for 30 days or until May 28, 1999. By letter dated May 3, 1999, the FAA notified interested members of the public of its intent to adopt the ANG FEIS. Also included in the mailing was a copy of the summary of major environmental concerns discussed above.

The public comment period was extended an additional 30 days to provide the public the opportunity to submit their comment on the references made by the FAA to the ANG aeronautical proposal. (FR dated May 20, 1999, Vol. 64, pg. 27612) In a letter dated May 19, 1999, the FAA mailed a summary of those refinements to the public and extended the period during which the FAA would receive public comments until June 21, 1999.

At the request of members of the public, the period during which the FAA would accept comment was extended one final time. By Federal Register Notice dated June 11, 1999, the FAA extended the informal public

comment period to August 2, 1999. (FR Vol 64, pp. 31676-31677) In excess of 400 comment letters were received by the FAA in response to the Federal Register Notices announcing its intent to adopt the ANG's FEIS. The letters were carefully read and considered. Major areas of concern were identified and a general response was sent to concerned citizens by letter dated August 11, 1999. All letters have become part of the administrative record and have been considered by the federal decision-maker.

Summary of Issues of Concern to the Public

Informal aeronautical meetings were held by the FAA to obtain aeronautical comments related to the proposed modification to the National Airspace System. However, the vast majority of comments made by the public during the FAA's six informal meetings were related to concerns about the potential for environmental impacts and the sufficiency of the environmental analysis performed by the ANG. The primary concern was noise and the potential impact to quality of life for those who live under the proposed airspace. Below is a list of the major environmental concerns identified during the informal meetings in addition to those raised by the public during the informal public comment period. The ANG FEIS and ROD were reviewed and a determination made that the issues identified below were adequately analyzed within the FEIS and ROD.

Issues of Concern

(1) Risk of aircraft accidents and the inability of local fire and rescue to respond to an accident.

(2) Concern about overflights over Route 17.

(3) Noise impacts to the Moffat School.

(4) Potential disproportionate effects on low income and minority populations. (Environmental Justice concerns).

(5) Risk of collisions with other airspace users.

(6) Potential impacts on children's health and safety.

(7) Noise and compatible land use, including startle effect on horses and other livestock and sleep disturbance.

(8) Potential impacts to tourism and property values.

(9) Inability to obtain "natural quiet" over National Park Service Parks.

(10) Potential Impacts to migratory birds and other wildlife.

(11) Accountability of the military pilots.

VII. Decision

After careful and thorough review of the ANG's FEIS, the FAA has determined that the FEIS complies with the National Environmental Policy Act of 1969, (42

U.S.C. Section 4371 et seq.), the CEQ's implementing regulations (40 CFR Sections 1500-1508), and FAA's order entitled "Policies and Procedures For Considering Environmental Impacts" (1050 1d). The FAA has considered the contents of the ANG FEIS, and the ANG ROD.

Under the authority delegated to me by the Administrator of the Federal Aviation Administration, I have decided to adopt the ANG FEIS pursuant to CEQ regulation 40 CFR 1506.3. Moreover, having considered the environmental and aeronautical comments received from the public, the FAA deems it necessary to undertake the additional mitigation measures identified above.

Dated September 28, 1999.

William J. Marx,
Manager, Environmental Programs Division, Air Traffic Management Program.

Right of Appeal

This decision is taken pursuant to 49 U.S.C. Section 40101 et seq. and 49 U.S.C. Section 47101 and constitutes an order of the Administrator, which is subject to review by the Court of Appeals of the United States in accordance with the provisions of 49 U.S.C. Section 46110.

Federal Aviation Administration,
Environmental Programs Division,
Air Traffic Airspace Management
Program, Attn.: Elizabeth Gaffin,
rm. 422, 800 Independence Ave.,
SW, Washington, DC 20591.

Issued in Washington, DC, on October 1, 1999.

William J. Marx,
Manager, Environmental Programs Division.

[FR Doc. 99-26170 Filed 10-6-99; 8:45 am]

[OCT. 28, 1997]

RECORD OF DECISION FOR THE COLORADO AIRSPACE INITATIVE

INTRODUCTION

The Air National Guard (ANG) prepared an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA). It addressed actions being proposed by the National Guard Bureau (NGB) to modify existing and create new military training airspace. Changes in airspace utilization by military flying units were also included. The actions would take place primarily in Colorado, and are collectively referred to as the Colorado Airspace Initiative (CAI).

The airspace addressed in the Final EIS will be used primarily by the Colorado Air National Guard (COANG), although other military service flying units will also use the airspace. The Federal mission of these units is to provide DoD with combat-ready aircrews and support personnel for worldwide deployments, should the need arise. During peacetime, units must maintain combat readiness by conducting proficiency training. The 140th Wing of the COANG is based at Buckley Air National Guard Base (ANGB) in Aurora, Colorado, with one detachment located at Fort Carson, Colorado. To serve its Federal mission, aircrews of the 140th Wing fly the F-16 aircraft. In addition, F-16 aircraft from Cannon Air Force Base, New Mexico, Kirtland Air Force Base, New Mexico,

and various USAF B-1 and B-52 bomber units will continue to fly in Colorado and adjoining states. Other military services (Navy, Marines, etc.) aircraft would also use the proposed airspace on an infrequent basis.

Retention of Buckley ANGB and the 140th Wing enables the USAF to maintain a combat ready force at a facility operated by the ANG which has accessible airspace close by, and is supported by part-time professional members of the local community.

The CAI serves to support the NGB's request for modification to the National Airspace System administered by the Federal Aviation Administration (FAA). These actions are to address modifications in military airspace configuration and utilization to respond to changes in readiness training requirements reflected in specific USAF regulations for military aircraft and personnel operating in the affected airspace, such as the F-16 aircraft and aircrews of the 140th Wing and the COANG. Another purpose is to respond to changes in commercial aircraft arrival and departure corridors dictated by the FAA for the operation of the new Denver International Airport (DIA).

PURPOSE AND NEED FOR THE ACTION

The declining Department of Defense (DoD) budget continues to reduce the active duty military force structure. However, force structure within the Air Reserve Components, which include the ANG, has remained relatively stable. Thus, reserve components missions are increasing as a percentage of the Total Force. As a result, the ANG is assuming a more prominent role in USAF

plans for response to global wartime situations. To rapidly and effectively respond to these situations, ANG units must continue training to the highest standards as established by the USAF for active duty units.

Pilot proficiency training requires the use of military airspace approved by the FAA known as MOAs and MTRs that are spread over various types of terrain. An air-to-surface gunnery range at Fort Carson, Colorado is utilized to accomplish practice bomb deliveries. Training scenarios include such activities as aircraft intercept and air combat maneuvers in the MOAs and low-altitude tactical navigation in the MTRs. Training in evasive tactics may incorporate the use of flares at altitudes in excess of 2,000 feet above ground level (AGL). Various USAF directives and instructions require this proficiency training.

Developments in military weapons systems, especially in evolution of look-down, shoot-down radar; long range air-to-air missiles; and advanced long range air-to-surface weapons have altered USAF doctrine and tactics. These changes in doctrine and tactics have necessitated modifying existing and creating new airspace for training purposes. The 140th Wing flight training requirements include air-to-air, air-to-surface, and low altitude training specifically tailored to the unit's intended wartime mission as prescribed by USAF.

Two near-term operational changes generate the need for this action. The first change results from F-16 aircraft modernization. Due to new aerospace technology, improved weapon systems, and modern tactics, the 140th Wing requires modifications to airspace in which training

occurs. Other military service's units will have similar needs and will require access to the airspace. Secondly, commercial air transport operations at the new DIA began in February 1995. Commercial air traffic will have priority over military flights operating in airspace near the airport. The Denver Air Route Traffic Control Center notified the 140th Wing in November 1991 that arrival and departure routing for the new airport would necessitate major changes to some of the civilian and military airspace currently used. This event required reconfiguration of military airspace by the ANG in Colorado. The CAI responds to these needs. This network of airspace components, with several MOAs and interconnected MTRs, is spread out over a wide area and provides an opportunity for the avoidance of bad weather and dispersal of operational impacts.

SELECTION CRITERIA

As part of the Final EIS process, three alternatives were considered: No Action, Original Proposal and the Preferred Alternative. Under both the Original Proposal and the Preferred Alternative, military airspace utilization would decrease compared to the No Action Alternative (existing conditions). A specific set of established narrowing criteria for the selection of military airspace was used to assist in identifying actions that could address the training needs. The USAF *Airspace Master Plan* sets forth these criteria, which specify both mandatory and desired parameters that need to be met for the configuration of military airspace. These criteria are specifically intended to ensure that military aircrews are able

to accomplish all the training necessary for them to accomplish wartime taskings, should the need arise.

The ANG has implemented its policy on Overflights of Designated Wilderness (NGB Letter, 9 Aug 1990) in response to the Colorado Wilderness Act of 1993. Changes in route configuration and operating altitudes were made pursuant to this policy.

PREFERRED ALTERNATIVE

The Preferred Alternative responds to concerns raised during and after the formal scoping period by private citizens, government agencies, and various public interest groups. It also addresses comments from the CAI Working Group and includes recommendations from the Governor's office. This Preferred Alternative would modify three existing MOAs and four MTRs, delete one MTR and a portion of one other, and establish one new MOA and three new MTRs (two of which utilize existing ground paths). One MOA would remain unchanged.

In accordance with current ANG policy, proposed and modified low-altitude airspace would be chartered to 300 feet AGL, but not flown lower than 500 feet AGL except in national emergencies or special training requirements. Training flights in some airspaces may be required below 500 feet AGL in the event that pilots must prepare for specific real world taskings. A small number of pilots (6 to 8) would fly training flights at 300 feet AGL (one flight for each pilot every 60 or 90 days, depending on experience level).

The airspace components that make up the Preferred Alternative are summarized below.

- **Modify Kit Carson A/B MOA and rename Cheyenne MOA.** This action would modify the Kit Carson A/B MOA, which is centered approximately 120 nautical miles southeast of Buckley Air National Guard Base, and rename them Cheyenne High and Low MOAs. Minimum altitude would be raised from 100 feet to 300 feet AGL.

- **Modify Pinon Canyon MOA.** This action would move the eastern border approximately 1 nautical mile to comply with FAA clearance criteria for a north-south airway.

- **Utilize La Veta MOA.** There would be no changes to this airspace under the Preferred Alternative. The floor of the MOA would remain at 13,000 feet mean sea level (MSL), except in the northeast corner of the MOA where the floor of La Veta Low would be at 1,500 feet AGL.

- **Modify Fremont MOA and rename Airburst MOA.** This action would extend the southeast corner of Fremont MOA east and south to connect with the La Veta MOA. The modified airspace would be renamed Airburst A, B, and C MOAs and would form contiguous airspace with the La Veta MOA and Airburst Range. The action would exclude an area over Canon City, Colorado and Penrose, Colorado. The bottom elevation of Airburst B and C would be 500 feet AGL.

- **Establish Two Buttes MOA.** This action would establish a new MOA immediately east of and adjoining Pinon Canyon MOA

(centered approximately 140 nautical miles south-southeast of Buckley ANGB). The area would be divided into low and high areas.

- **Modify IR-409.** This action would retain the current IR-409 airspace lateral and horizontal dimensions. The bottom elevation of IR-409 would be raised from the surface to 300 feet AGL from Point C to Point G (near Cedarwood) and raised from the surface to 500 feet AGL from Point G to the Airburst Range at Fort Carson, Colorado.

- **Delete VR-412.** This route would be eliminated.

- **Modify VR-413.** This action would modify the southwest corner turn point of the route at Point E and then continue to Cedarwood and adopt the routing of IR-409 to the Airburst Range. The entire route would be narrowed to three miles right and left of center except for where it adopts IR-409. The bottom elevation of VR-413 would be raised from the surface to 500 feet AGL for the entire route.

- **Modify IR-414.**The lateral dimensions of this route would remain as currently chartered. The minimum altitude would be raised from the surface to 300 feet AGL. An existing maneuver area would also be eliminated.

- **Establish XIR-424.** This action would create a new MTR that follows the reverse ground path of IR-414 and then follows the existing ground path of IR-409 to the Airburst Range. The bottom altitude of XIR-424 would be 500 feet AGL from Cedarwood to Airburst Range. (Note: The "X" in XIR denotes that

the route is proposed and does not currently exist).

- **Modify IR-415.** This action would modify IR-415 so that it would join existing IR-409 at Cedarwood and continue to the Airburst Range. The minimum altitude for this route would be raised from the surface to 300 feet AGL from the beginning to Point E (near Cedarwood) and raised from the surface to 500 feet AGL from Point E to the Airburst Range.

- **Modify IR-416.** This action would delete the southern portion of the route from Point G to Point L and the altitudes of the remaining route would be raised from the surface to 300 feet AGL.

- **Establish XIR-426.** This action would create a new MTR which follows the reverse ground path of the current IR-416 from Point L to Point G. The minimum altitude of this route would be 300 feet AGL.

- **Establish XVR-1427.** This action would create a visual route which would begin approximately 7 nautical miles south of the northern border of Cheyenne MOA. The route would proceed south, west, then north and terminate at Airburst Range. The new VR would conform to the existing IR-409 route widths and altitudes beginning at Point F. The minimum altitudes prior to Point F would be 300 feet AGL.

THE ORIGINAL PROPOSAL

This alternative was originally identified during scoping as the Proposed Action. As a result of the scoping process and issues identified, NGB identified a new Preferred Alternative and is no longer advocating this as the Proposed Action. As proposed, the Original Proposal would modify four existing MOAs and four MTRs, delete one MTR and a portion of another, establish one new MOA and three new MTRs (two which utilize existing MTR corridors). Training flights in some airspaces would be required below 500 feet AGL in the event the pilots must prepare for specific wartime taskings.

Several facets of the Original Proposal were incorporated into the Preferred Alternative (discussed above), including:

Modify Kit Carson A/B MOA and rename it Cheyenne MOA.

VR-412 would be eliminated.

Modify Pinon Canyon MOA.

Establish Two Buttes MOA.

Modify IR-414.

Modify IR-416.

Establish XIR-426.

Additional airspace components that make up the Original Proposal are summarized below:

- **Modify La Veta MOA.** This action would reduce the lateral size of La Veta MOA, eliminate the La Veta Low MOA designation, and lower the floor of the entire MOA to 300 feet AGL.

- **Modify Fremont MOA and rename it Airburst MOA.** This action would extend the southeast corner of Fremont MOA east and south to connect with the La Veta MOA. The modified airspace would be renamed Airburst A, B, and C MOAs and would form contiguous airspace with the La Veta MOA and Airburst Range.
- **Modify IR-409.** This action would move IR-409 Point G southwest so the route would traverse the La Veta MOA. The minimum altitude would be raised from the surface to 100 feet AGL to meet training requirements for the F-111 aircraft.
- **Modify VR-413.** This action would relocate Point E approximately 14 nautical miles south-southeast of its current location and reduce the route width between Point D and Point F. Points G and H would be relocated to conform with the proposed IR-409 modification. In addition, the maximum altitude between Points B and H would be 3,000 feet AGL to allow for compliance with the ANG's wilderness overflight policy. The minimum altitude for the entire route would be raised from the surface to 300 feet AGL.
- **Establish XIR-424.** This action would create a new MTR that follows the reverse ground path of IR-414 and then follows the proposed ground path of IR-409 to the Airburst C MOA.
- **Modify IR-415.** This action would modify IR-415 beginning at Point F to follow the revised IR-409 from the new Point H to Airburst Range. The minimum altitude would be raised from the surface to 300 feet AGL.

- **Establish XVR-1427.** This action would create a visual route that would begin approximately 7 nautical miles south of the northern border of Cheyenne MOA. The route would proceed south, west, and then north and terminate at Airburst C MOA. The minimum altitude of this route would be 300 feet AGL.

THE NO-ACTION ALTERNATIVE

Under the No-Action Alternative, existing airspace would continue to be used and no modifications to training airspace configuration would be made. Changes to military airspace necessitated by the operation of the new DIA, as well as other changes prompted by the FAA for clearance from commercial aircraft airspace, have been identified. If the training airspace remains in its current configuration pilots would not be able to meet their training requirements in a fashion that would adequately prepare them for wartime taskings.

OTHER ALTERNATIVES NOT CARRIED FORWARD FOR DETAILED STUDY

Five other alternatives were originally identified but were eliminated from further detailed study. The first of these alternatives was the use of other existing MOAs and MTRs aside from those addressed previously. One MOA and five MTRs were identified. Each was eliminated because they did not meet criteria established for meeting aircrew proficiency requirements or were dismissed by the FAA. The second of these alternatives was the establishment of new airspace. Six new MOAs were

considered. Each of these also were eliminated from further consideration because they did not meet training or distance from home station requirements. The third alternative was the elimination of the 140th Wing of the COANG. This alternative was eliminated because recent evaluations have shown economic and logistical advantages associated with many state ANG units including the 140th Wing. The fourth alternative was the elimination of military training airspace in Colorado. This alternative would prevent Colorado-based military pilots from accomplishing required training. The fifth alternative was the use of aircraft simulators as a substitute for all flight training of aircrews. The F-16 training regulations stipulates those activities that may be accomplished using simulators and those requiring actual flying. Although simulators work well for certain types of training, this alternative was eliminated because simulator training could not provide the most important aspect of aircrew proficiency training, which is the requirement to conduct actual military training flights.

SUMMARY OF ENVIRONMENTAL EFFECTS

In order to evaluate the alternatives considered, the ANG generated quantitative data on the potential impacts associated with the alternatives. In this evaluation, the maximum number of training sorties possible for each airspace was assumed to occur. Each airspace was individually addressed in this manner. In addition, the results from this analysis for each airspace component were then added together with coincidental airspace. This compilation of sorties produced a cumulative total of all military aircraft operations in these military airspaces

and provided a rational basis upon which to determine impacts.

Based on the analyses conducted for the EIS, neither the Preferred Alternative, the Original Proposal, nor the No-Action Alternative result in significant environmental impacts. Any impacts which may occur can be minimized through the use of mitigation measures.

Noise

Maximum noise levels in MOAs are generally associated with MTRs crossing or leading into the MOAs and thus are confined to relatively small areas in the vicinity of MTR centerlines and confluence's. Utilization of the MOAs themselves tends to be a secondary contributor to cumulative noise. This is consistent with the wide-area use of MOAs, which tends to disperse aircraft noise. Away from the flight concentrations along MTRs, noise levels in most of the MOA areas are substantially less than the maximum level for each airspace.

Quantitative assessment of noise impacts is done in terms of Ldnmr (Onset Rate-adjusted Monthly Day-Night Average Sound level (A-weighted)), since that metric has been demonstrated to correlate with community response to noise. Sound Exposure Level (SEL) analysis was performed to provide such a description. This analysis is presented in the form of the number of times a day individual aircraft events at a specified location would exceed 45 decibel (dB) (representing events which might be heard), 65 dB (representing events which might be intrusive) and 90 dB (overheard or near-overheard low-altitude events which would be intrusive).

If either the Original Proposal or the Preferred Alternative is implemented, maximum Ldnmr would range from 36 dB (Ir-416 and XIR-426) to 56 dB (Two Buttes Low and High, IR-409). As with the baseline (No-Action Alternative), noise is dominated by operations on MTRs, and the maximum noise levels analyzed would occur over a small percentage of the airspace. Noise levels in about half the airspaces would increase by 1 dB to 4 dB (Preferred Alternative) or 1 dB to 5 dB (Original Proposal) relative to existing conditions. For the airspace affected, this increase would probably be noticeable. Noise in two airspaces (Airburst B and Airburst C) would increase by 8dB to 11 dB (Preferred Alternative) to 6 dB (Original Proposal). These increases would be noticed.

Although increased noise would be noticed, these levels are low compared to those levels which people generally find objectionable. Numerous studies have shown that a Ldnmr of 55 dB, which would occur in very defined locations, would cause only about 3.3 percent of the affected population to be highly annoyed. The 55dB level is also well below levels which could credibly have adverse effects on hearing or health, and is well below the 65 dB criterion which is often used by government agencies for land use compatibility planning. A 55 dB threshold has been identified by the U.S. Environmental Protection Agency as a level which would be protective of public health and welfare with a margin of safety, and is generally regarded as a goal in residential areas. With that as the maximum cumulative level, and significantly lower levels occurring in most of the remaining areas of the airspace, it can be concluded that there will be no significant adverse noise impacts resulting form the CAI.

The relative rarity of individual noise events supports the conclusion, based on Ldnmr, that there will be no significant noise impact.

Airspace Management/Air Traffic

The Preferred Alternative and the Original Proposal would both minimize air traffic conflicts associated with the operation of the DIA. The analysis indicates that there would be no new generated impacts on Federal airway, air traffic operations area, or Class B and C airspace from the Preferred Alternative or the Original Proposal.

The designation of Airburst B and C MOAs under the Preferred Alternative and Original Proposal enhances general aviation safety around the existing IR-409 MTR corridor and around the Fremont County Airport by highlighting military airspace boundaries on aeronautical maps and charts, thus providing more awareness of the existence of military training operations in this area.

Safety

The safety analysis conducted for this EIS does not indicate that significant impacts would result from the implementation of the Preferred Alternative or the Original Proposal. The probability of an aircraft mishap is low, especially a mishap that would result in injury to civilians or private property. The assessment of potential impacts on safety indicates that the mishap potential, the bird-aircraft strike hazard, and fire potential would remain low. No chaff would be used and flares would be

used only at altitudes above 2,000 feet AGL. Consequently, impacts from the use of flares would be remote.

The potential for a bird-aircraft strike would not change significantly under any of the alternatives. Both the Preferred Alternative and the Original Proposal Alternative consist largely of modifications to existing airspace or establishment of new airspace in the vicinity of existing airspace. These actions would encompass the same seasonally adjusted bird avoidance procedures associated with known bird migration corridors as currently utilized with existing airspace. The probability of a bird-strike is very low.

Land Uses and Resources

Because neither the Preferred Alternative nor the Original Proposal Alternative involves ground disturbance, no impacts are expected for access to, or use of, land resources. The assessment of potential impacts indicates that noise levels would continue to remain low compared to generally accepted land use compatibility guidelines. Generally, the potential impacts to sensitive land use receptors would be negligible although in some cases may be slightly adverse in a few selected locations above 55 dB. Existing land use patterns would not be precluded or substantially disrupted. The analysis of land uses and resources does not reveal any significant impacts to sensitive land use receptors with noise impacts existing for a short period of time and then disappearing. In cases where airspace is withdrawn from use, aircraft noise affecting land use receptors would be deleted and the potential impact would be beneficial.

Visual Resources and Aesthetics

The analysis of visual resources and aesthetics does not reveal any significant impacts that would result from the proposed alternatives. Aircraft operations are sporadic and would exist for a short period of time and then disappear. The assessment of potential impacts from noise on aesthetics as a result of the Preferred Alternative or the Original Proposal reveals little basis for concern. Impacts to visual resources and aesthetics would be negligible.

Biological Resources

The assessment of potential impacts resulting form [sic] the proposed alternatives on biological resources indicates that there will be no adverse impacts on wildlife or livestock. Mitigation measures specifically targeted to reduce or avoid noise impacts on selected ground locations would enhance protection of potentially sensitive species.

None of the alternatives will require any ground disturbing activities; therefore, the potential impacts on vegetation would be negligible. Projected noise levels associated with low-altitude overflights could initially startle wildlife or livestock, but animals have been shown to adapt to these types of disturbances behaviorally and physiologically. Observations of the effects of low-altitude military aircraft operations on the potential to cause a stampede or other negative effects with bison were conducted in a study to support the EIS. Results indicated little or no possibility of negative effects on the

bison. Under both the Preferred Alternative and the Original Proposal, noise impacts on livestock and other sensitive receptors would generally continue to remain within protection levels identified for these species in current scientific information.

Pursuant to Section 7 of the Endangered Species Act, (16 USC Sec. 1531 et seq.) and following consultation with the ANG, the U.S. Fish and Wildlife Service (USFWS) issued a Biological Opinion (BO), dated 1 July 1997, addressing potential impacts to Threatened and Endangered species that might result from the ANG's proposed actions. In its BO, the USFWS concluded that the ANG's aircraft training operations would have "no adverse effect" on the Mexican spotted owl and the bald eagle. Regarding the peregrine falcon, the USFWS concurred with the determination made by the ANG in its 4 April 1997 Biological Assessment that its proposed activities may adversely effect [sic] the falcon. However, in the BO, the USFWS concluded that the ANG training activities would not be likely to jeopardize the continued existence of the falcon. The BO details specific mitigation measures to be followed by the ANG to minimize impacts on the falcon. Nest sites within the affected airspace will be avoided by 3,000 feet during the bird's annual nesting period.

Cultural Resources

None of the alternatives would permanently alter the visual or audio environment of sites listed or eligible for listing on the National Register of Historic Places. Visual and audible intrusions to the setting of eligible and listed

National Register sites would be brief and transitory in nature; therefore, there would be no adverse impact to qualities of integrity or eligibility for listing on the National Register. The assessment of potential impacts on cultural resources indicates that the probability of damage to fragile structures, such as historic or prehistoric cultural resources, would range from very low to negligible. A review of the proposed alternatives by state historic preservation offices and Native American tribal representatives did not identify any adverse impacts resulting from these alternatives.

Air Quality

The total air pollution emissions would be reduced under the Preferred Alternative and the Original Proposal as compared to existing conditions. Total number of flying hours would be reduced. No air pollution concentrations resulting from aircraft operations would cause any local area to be out of compliance with Federal or state standards or make any significant impact on air quality in any area. Also, when comparing these air pollution concentrations with Federal and state limits for the Prevention of Significant Deterioration (PSD) air quality, all levels were far below minimum threshold levels.

Socioeconomic Resources

Direct impacts to socioeconomic resources are precluded by the fact that none of the airspace alternatives involve realignment of military aircraft, changes in personnel, or construction of military facilities. With the exception of Hamilton County in Kansas, the counties

within each Region of Influence (ROI) have experienced military aircraft operations for many years. In addition, no widespread, repetitive, or consistent patterns across the ROIs have been identified. Under the No-Action Alternative, current conditions would continue, and there would be no changes to socioeconomic resources as a result of this alternative. Under the Preferred Alternative and Original Proposal Alternative, no significant impacts to existing socioeconomic conditions would be expected as a result of implementing either of these alternatives. Therefore, implementation of any one of the three airspace alternatives would be expected to result in no significant impacts to socioeconomic resources.

The CAI assessed potential impacts to minority or low-income communities, pursuant to Executive Order 12898, Federal Actions to address Environmental Justice in Minority Populations and Low-Income Populations. This assessment resulted in the conclusion that the very nature of the wide geographic area covered by the CAI effectively precludes operations from impacting counties where only a particular socioeconomic, ethnic, or religious group occurs.

Hazardous Material Release

In the event of an aircraft crash of sufficient force to rupture hazardous material containers, it is highly probable that a fire would result. All the Hazardous materials aboard the aircraft, including hydrazine, are flammable and would most likely be consumed by the fire. Nonetheless, there is a very small chance that a crash would occur in which the hazardous materials would not be consumed

by fire. If a crash occurs on land, then the hazardous materials would contaminate the soil in the immediate vicinity. The movement of fuel, oil, and hydrazine through the soils is slow and limited due to absorption and decomposition. There would not be sufficient amounts of hazardous materials released to pose a threat to groundwater sources. Contaminated soil would have to be removed or cleaned by the USAF, ANG or Air Force Reserve installation in closest proximity to the crash site. If a crash occurs adjacent to or in surface water, then the hazardous materials could contaminate the surface water. The fuels and hydraulic oils could be removed from the water if they had not been greatly dispersed. The hydrazine could be diluted in the water to safe concentrations, or could be neutralized by bleach or calcium hypochlorite. However, if a release of hazardous materials were released into a small stream or confined surface water, potential impacts to aquatic organisms could result. Since the probability of an aircraft crash is extremely low, impacts from a release are not considered to be significant.

Human Health Effects

Based on the results of an extensive review of existing research on the effects of low-altitude aircraft noise on humans, negative health effects from military training operations in any of the airspace associated with any of the alternatives are highly unlikely. Other health risks, such as adverse cardiovascular effects or mental health problems, have not been demonstrated to be associated

with the noise levels or exposure rate relevant for any of the alternatives.

PUBLIC INVOLVEMENT

Scoping Process

The Air National Guard announced its intent to prepare an EIS with a *Federal Register* notice (see 58 F.R., No. 130, p. 36848). The July 9, 1993 Notice of Intent (NOI) to prepare the EIS also provided notice of a series of nine meetings in two states during the period of August 2 to 17, 1993 and specified that the comment period extended through September 3, 1993. On January 7, 1994, one additional scoping meeting and two information meetings were announced in the *Federal Register* and subsequently held in February 1994 (see 59 F.R., 5, p. 1006). Press releases and display advertisements were provided to the media regarding each scoping meeting. These meetings were held in the parts of Colorado that would be potentially affected by specific aspects of the proposal.

Scoping and information meetings were held as follows:

- Penrose, Colorado, Scoping Meeting was held on August 2, 1993, at the Penrose School.
- Westcliffe, Colorado, Scoping Meeting was held on August 3, 1993, at the Custer County School.
- Moffat, Colorado, Scoping Meeting was held on August 4, 1993, at Moffat High School.
- Rye, Colorado, Scoping Meeting was held on August 5, 1993, at Rye High School.

- Fowler, Colorado, Scoping Meeting was held on August 9, 1993, at Fowler High School.
- Las Animas, Colorado, Scoping Meeting was held on August 10, 1993 at Las Animas High School.
- Tribune, Kansas, Scoping Meeting was held on August 11, 1993 at the Greeley County High School.
- Kit Carson, Colorado, Scoping Meeting was held on August 12, 1993 at the Kit Carson City Hall.
- New Raymer, Colorado, Scoping Meeting was held on August 17, 1993 at the Prairie School.
- Fort Garland, Colorado, Scoping Meeting was held on February 1, 1994 at the Blanca/Fort Garland Community Center.
- Westcliffe, Colorado, Information Meeting was held on February 2, 1994 at the Custer County School.
- Gardner, Colorado, Information Meeting was held on February 3, 1994 at the Gardner School.

In addition, two other less formal Information meetings were held; the first on April 7, 1994 in La Junta, Colorado and the other on May 26, 1994 in La Veta, Colorado. The total period of time devoted to scoping meetings was approximately 42 hours. Of the approximately 650 persons who attended one or more meetings, or subsequently mailed in comments, over 300 verbal comments were recorded and over 850 written comments were received.

Summary of Issues Identified

A variety of issues and concerns were raised at the scoping and information meetings for the CAI. The primary issues were noise generated by aircraft overflights, socioeconomic impacts, and safety risks. Other subsets of these primary issues include, but are not limited to, the following:

- Noise impacts on human health, wildlife, land use, and solitude.
- Biological impacts on wildlife and domestic animals.
- Safety impacts regarding mishaps, fire potential, and contamination, as well as pilot accountability regarding flying violations.
- Requirements and need for the CAI; long term viability of Airburst Range; and use of CIA [sic] related airspace by other users.
- Socioeconomic impacts regarding tourism and property values.
- Quality of life impacts and solitude as a unique asset to Colorado.

Public Comment on the Draft Environmental Impact Statement

As a result of the scoping process and the issues identified, NGB identified a Preferred Alternative. The Preferred Alternative is an evolution of the Original Proposed Action, which is now identified as the Original Proposal.

A Notice of Availability (NOA) for the Draft EIS was published in the *Federal Register* on March 29, 1996 (see 61 F.R., No. 62, p. 14097). This initiated the comment period for the CAI Draft EIS. The initial mailing of the document to over 750 addressees was accomplished on March 20, 1996. The close of the comment period was initially published as June 5, 1996 (68 days), and then extended to July 12, 1996 (105 days).

Public Hearings (Meeting) Process

A series of seven public meetings were scheduled for the period of May 7 to May 22, 1996. The meeting locations were selected to ensure the inclusion of a wide geographic representation of potentially interested parties within the affected areas to ensure maximum participation. Input from the CAI Working Group and its members were also considered.

Oral and written comments were solicited at all meetings. All meeting sites except Westcliffe, Colorado offered information displays. In response to citizen's request, the Westcliffe meeting was exclusively oral public comments. In order to allow everyone an opportunity to comment at the public meetings, a time limit of five minutes was established for each individual oral comment. After everyone had spoken, individuals were given the opportunity to speak again in case the initial five minute period had not been adequate for an individual to complete their comments. This was repeated until everyone had given all their comments. No oral comment session ended with individuals indicating a need for addition [sic] time.

Public meetings were held as follows:

- Lamar, Colorado, meeting was held on May 7, 1996 at the Lamar High School.
- La Junta, Colorado, meeting was held on May 8, 1996, at Otero Junior College.
- Alamosa, Colorado, meeting was held on May 14, 1996, at the Adams State College.
- Canon City, Colorado, meeting was held on May 15, 1996, at the Canon City High School.
- Westcliffe, Colorado, meeting was held on May 16, 1996, at the Custer County High School.
- Cheyenne Wells, Colorado, meeting was held on May 21, 1996, at the Cheyenne County Community Building.
- Aurora, Colorado, meeting was held on May 22, 1996, at the Rangeview High School.

Summary of Issues Identified

In addition to the 245 oral comments received at the public meetings, 281 written comments were received by the close of the comment period on July 12, 1996. These comments are presented in their entirety in the final EIS, along with responses prepared by the ANG.

A broad range of issues was raised concerning both general opposition to the CAI, and the specific findings of the Draft EIS. The most common comment was general opposition to any type of military aircraft flying over someone's personal property because of the perceived impact on quality of life and peace and quiet. The second

most prevalent comment was directed at the noise modeling methodologies used in the EIS to analyze military aircraft noise impacts.

Numerous other comments were directed at concerns for potential impacts to domestic animals and wildlife, real estate values, tourism, aircraft accidents and fires, and pilot accountability for staying within assigned airspace boundaries. The need for the airspace and low-altitude training was also questioned. Some commentors felt the flight or sortie numbers used in the EIS did not represent actual training events that would occur.

Finally, numerous commentors expressed displeasure with the meeting locations, time limits for oral comments, or the length of the comment period.

MITIGATION MEASURES

Mitigation measures for individual airspace components, and the State of Colorado, to lessen noise impacts on specifically identified noise sensitive locations on the ground have been identified and are as follows:

Airburst A MOA

- Maintain a minimum 3,000-foot lateral and overhead avoidance distance for the two known peregrine falcon nest sites from March 15 through July 15.

Two Buttes MOA

- To avoid hitting waterfowl on their feeding flights, pilots should avoid flying below 1,000 feet AGL in the area east of Highway 287 during the

dawn/dusk time periods from August to December and from March to May.

IR-409

- To minimize noise impacts, noise sensitive areas (environmentally sensitive) have been identified and minimum altitudes have been raised to 1,000 feet AGL or 1,500 feet AGL as appropriate. These areas will be located on pilot briefing charts at COANG.

VR-413

- To reduce impacts to Florissant Fossil Beds National Monument, pilots should observe a minimum altitude of 1,500 feet AGL if over the northwest corner of the Monument, or avoid laterally.
- To increase aviation safety, information about Hayden and La Veta passes being the preferred general aviation routes will be included in briefings to 140th Wing pilots and other pilots who fly in 140th Wing managed airspace.

XVR-1427

- To minimize noise impacts, noise sensitive (environmentally sensitive) areas have been identified and minimum altitudes have been raised to 1,000 feet AGL or 1,500 feet AGL as appropriate. These areas will be located on pilot briefing charts at COANG.

STATE OF COLORADO

- The National Guard Bureau in Washington DC will conduct a feasibility study regarding the long range viability of the Airburst Range located on [sic] Fort Carson, Colorado and the MOAs and MTRs (military training routes) associated with the range. The study will determine the future of

the Airburst Range for the Colorado Air National Guard. (NOTE: This study has been completed).

- The Governor will hold the Colorado Air National Guard accountable for an effective low altitude noise avoidance program in the airspace under their control. The Governor will assign one of his staff offices the responsibility of overseeing the success of the COANG in their goal of avoiding designated areas. Citizens would be able to voice complaints to this office if the COANG is not able to resolve the noise complaint issue.
- The Final EIS has identified noise sensitive areas. Others will be identified as the airspace is used and appropriate avoidance measures will be taken. The COANG will conduct annual visits to agreed upon sites to determine the success of their noise avoidance program.
- The Annual Airspace Utilization report prepared by the COANG will be made available to the Governor and will be releasable to the public upon request.
- The Governor will request that follow-up noise studies be conducted once the airspace is being fully utilized.
- Emergency Aircraft Response training will be made available by the COANG upon request.

CONSIDERATIONS FOR DECISION

Based upon public and agency input and the analyses conducted for the EIS using industry accepted criteria, the Preferred Alternative, the Original Proposal, and the No-Action Alternative do not appear to result in significant environmental concerns. None would create environmental impacts that are significant and impacts can be

mitigated through routinely used operational procedures or through a specifically applied mitigation action designed to reduce potential impacts.

After taking mitigation actions into consideration, all remaining potential impacts to specific environmental resources that are likely to occur are either insignificant or exist for a short period of time and then disappear. Implementation of the CAI would not result in an irreversible or irretrievable commitment of environmental resources or permanent degradation of environmental quality. Noise levels are quite low overall when compared to government accepted standards. Specific areas identified as having the highest Ldnmr levels for both the Preferred Alternative and the Original Proposal do not exceed 56 dB. The potential for significant impacts from safety issues is likely to be very low, and effective airspace management would be enhanced. No known significant impacts on biological resources are associated with aircraft noise, including potential impacts to any protected or sensitive species that might occur in the region of influence for the CAI. Specifically targeted mitigation measures further ensure protection of potentially sensitive biological resources identified through coordination with various regulatory agencies. No significant impacts to socioeconomic resources would be expected. Because no ground disturbance would be associated with any of the alternatives, there would be no impact on earth resources, water resources, and land use resources. Impacts to cultural, visual and aesthetic resources would be negligible. Nonetheless, aircraft noise, however brief, may be considered by some individuals to be highly annoying, particularly those living in areas having the

characteristics of openness and solitude. Most of the area associated with airspace components of the CAI, under both the Preferred Alternative and the Original Proposal Alternative, are located over relatively sparsely populated areas.

As a result of the public participation process, including scoping meetings, input from the CAI Working Group and recommendations from the governor's office, the proposal initially favored by the ANG was changed and evolved into what is now identified as the Preferred Alternative. Thus, the NEPA process functioned as intended and resulted in a decision to proceed with a Federal action that has less impacts on environment and quality of life than the action as it was originally envisioned.

The Original Proposal and the Preferred Alternative differ only slightly in terms of the overall impacts associated with the combined configuration of individual MOAs and MTRs that make up each alternative. Under both alternatives, military airspace utilization in Colorado, as measured by sorties and total flight hours, would decrease compared to the No-Action Alternative (existing conditions). Both alternatives have the advantage over the No-Action Alternative of improving avoidance of wilderness areas and decreasing impacts to sensitive receptors. Both alternatives raise minimum flight altitudes for normal operations from ground level to levels of 300 to 500 feet AGL or higher. The Preferred Alternative was identified by NGB as "Preferred" primarily because it can fulfill all the mission requirements offered by the Original Proposal but also has the advantage of decreasing air traffic in the La Veta MOA and eliminating flight activity

in the vicinity of Penrose, Colorado and Canon City, Colorado, currently under the Fremont MOA. In addition, the Preferred Alternative includes several MTRs that would have the minimum allowable altitudes raised to 500 feet AGL at all times for all or a portion of their routes. Airburst B and C MOAs also would have their bottom elevations established at 500 feet AGL. For the aforementioned reasons, NGBs Preferred Alternative is also the environmentally preferred alternative.

Subsequent to the publication of the Final EIS, the FAA requested minor modifications to certain MTRs during their aeronautical review. These changes include:

- IR-409 – Corridor width narrowed along selected legs.
- IR-414 – Corridor width narrowed under Cheyenne MOA.
- XIR-424 – Corridor width narrowed under Cheyenne MOA.
- IR-416 – Corridor width narrowed under Cougar MOA. Southern half of the route will not be deleted.
- XIR-426 – Proposal withdrawn (No-Action Alternative)

The ANG is in the process of modifying these proposals. No environmental impacts are anticipated as a result of these changes since narrowing widths of MTRs does not substantially change the noise environment or air quality. In fact, positive impacts, in terms of fewer noise sensitive receptors, may be achieved.

DECISION

This action is necessary to respond to changes in fighter aircraft readiness training requirements as set forth by the USAF. The ANG must accommodate such changes in requirements in order to provide the DoD with combat-ready aircrews and support personnel for worldwide deployments, should the need arise. I have decided to implement the Preferred Alternative, except for FAA changes noted above, as set forth in the Final EIS because it can fulfill all of the ANG's mission requirements, accommodates public concerns raised during the NEPA process, and includes the previously mentioned environmental and operational advantages to the other alternatives. All reasonable and practicable efforts have been or will be made to minimize any related impact to the local public and environment.

/s/ Donald W. Shepperd
DONALD W. SHEPPERD
Major General, USAF
Director, Air National Guard

Constitutional Provisions

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law. U.S. Const. amend. III.

Statutory Provisions

Relevant Excerpts from The Federal Aviation Act:

49 U.S.C. § 106(c)-(d) provide:

(c) The Administrator must –

(1) be a citizen of the United States;

(2) be a civilian; and

(3) have experience in a field directly related to aviation.

(d)(1) The Deputy Administrator must be a citizen of the United States and have experience in a field directly related to aviation. An officer on active duty in an armed force may be appointed as Deputy Administrator. However, if the Administrator is a former regular officer of an armed force, the Deputy Administrator may not be an officer on active duty in an armed force, a retired regular officer of an armed force, or a former regular officer of an armed force.

(2) An officer on active duty or a retired officer serving as Deputy Administrator is entitled to hold a rank and grade not lower than that held when appointed as Deputy Administrator. The Deputy Administrator may elect to receive (A) the pay provided by law for the Deputy Administrator, or (B) the pay and allowances or the

retired pay of the military grade held. If the Deputy Administrator elects to receive the military pay and allowances or retired pay, the Administration shall reimburse the appropriate military department from funds available for the expenses of the Administration.

(3) The appointment and service of a member of the armed forces as a Deputy Administrator does not affect the status, office, rank, or grade held by that member, or a right or benefit arising from the status, office, rank, or grade. The Secretary of a military department does not control the member when the member is carrying out duties and powers of the Deputy Administrator.

49 U.S.C. § 40102(a)(30) provides:

(30) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

49 U.S.C. § 40103(b) provides:

(b) **Use of airspace.** – (1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for –

(A) navigating, protecting and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(3) To establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security, the Administrator, in consultation with the Secretary of Defense, shall –

(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and

(B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.

(4) Notwithstanding the military exception in section 553(a)(1) of title 5, subchapter II of chapter 5 of title 5 applies to a regulation prescribed under this subsection.

49 U.S.C. § 46105(b) provides:

(b) **Contents and service of orders.** – An order of the Secretary or Administrator shall include the findings of fact on which the order is based and shall be served on the parties to the proceeding and the persons affected by the order.

49 U.S.C. § 46110(a)-(c) provide:

(a) **Filing and venue.** – Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Federal Aviation Administration with respect to the aviation safety duties and powers designated to be carried out by the Administrator) under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) **Judicial procedures.** – When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary or Administrator, as appropriate. The Secretary or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) **Authority of court.** – When the petition is sent to the Secretary or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary or

Administrator to conduct further proceedings. After reasonable notice to the Secretary or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary or Administrator, if supported by substantial evidence, are conclusive.

49 U.S.C. § 44103(b) provides:

(b) **Controlled substance violations.** – (1) The Administrator may not issue an owner's certificate of registration under subsection (a)(1) of this section to a person whose certificate is revoked under section 44106 of this title during the 5-year period beginning on the date of the revocation, except –

(A) as provided in section 44106(e)(2) of this title; or

(B) that the Administrator may issue the certificate to the person after the one-year period beginning on the date of the revocation if the Administrator decides that the aircraft otherwise meets the requirements of section 44102 of this title and that denial of a certificate for the 5-year period –

(i) would be excessive considering the nature of the offense or the act committed and the burden the denial places on the person; or

(ii) would not be in the public interest.

(2) A decision of the Administrator under paragraph (1)(B)(i) or (ii) of this subsection is within the discretion of the Administrator. That decision or failure to make a decision is not subject to administrative or judicial review.

Relevant Excerpts from the Administrative Procedure Act

5 U.S.C. § 553(a)(1) provides:

This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

5 U.S.C. § 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Relevant Excerpts from the National Environmental Protection Act ("NEPA")

42 U.S.C. § 4332 provides in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency processes;

. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

. . . .

Regulatory Provisions

NEPA's implementing regulations, 40 C.F.R. §§ 1500.1 and 1508.25(a)(1), provide:

§ 1500.1 Purpose

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help

public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1508.25(a)(1) Scope

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are independent parts of a larger action and depend on the larger action for their justification.

14 C.F.R. § 73.3 provides:

Special use airspace

(a) Special use airspace consists of airspace of defined dimensions identified by an area on the surface of the earth wherein activities must be confined because of their nature, or wherein limitations are imposed upon aircraft operations that are not a part of those activities, or both.

(b) The vertical limits of special use airspace are measured by designated altitude floors and ceilings expressed as flight levels or as feet above mean sea level. Unless otherwise specified, the word "to" (an altitude or flight level) means "to and including" (that altitude or flight level).

(c) The horizontal limits of special use airspace are measured by boundaries described by geographic coordinates or other appropriate references that clearly define their perimeter.

(d) The period of time during which a designation of special use airspace is in effect is stated in the designation.

14 C.F.R. § 91.119(a)-(c) provide:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle

within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(LOGO)

U.S. Department
of Transportation

Federal Aviation
Administration

7400.2D

Procedures for Handling Airspace Matters

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PART 7. SPECIAL USE AIRSPACE

Chapter 27. GENERAL

Section 1. POLICY

27-1. INTRODUCTION

In addition to the requirements of Part 1, this part contains the policy, procedures, and criteria for the assignment, review, modification, and revocation of special use airspace. Special use airspace is airspace of defined dimensions wherein activities must be confined because of their nature, and/or wherein limitations may be imposed upon aircraft operations that are not a part of those activities.

27-2. CATEGORIES

The handling of special use airspace matters falls into two categories. The first category consists of rulemaking actions which include restricted areas and prohibited

areas. These relate to the assignment, review, modification, or revocation of airspace by a rule, regulation, or order as prescribed in Federal Aviation Regulations (See Part 11). The second category consists of nonrulemaking actions and includes alert areas, controlled firing areas, and military operations areas (MOA's) where the FAA has the authority to make the final decision but does not express that decision by issuing a rule, regulation, or order. Also included in the nonrule category are offshore warning areas where the FAA has an interest, but the final approval is shared by other agencies.

27-3. MINIMUM NUMBERS AND VOLUME

a. Special use airspace programs are designed to accommodate national security and welfare and necessary military activity. They identify for other airspace users where the activity occurs and protect other users from hazardous operations. While establishment of special use airspace is essential to national security and the military mission, unnecessary proliferation of these areas degrades the special use airspace program and adversely affects the overall efficiency of the National Airspace System.

b. The volume of airspace to be included in any specific area of special use airspace and the time during which it is to be assigned shall be the minimum required to contain the proposed user activities, including safety zones required by military authority. When an aircraft activity conducted in special use airspace could measurably affect the safety of persons or property on the surface,

the proponent shall demonstrate that provisions have been made for their protection.

27-4. OPTIMUM UTILIZATION

To ensure optimum airspace utilization, using agencies shall be encouraged to make their airspace available for the activities of other agencies on a shared use basis. In this regard, all special use airspace proposals shall be specifically reviewed for a determination of whether the military requirement can be accommodated within, or by modifying, existing areas.

27-5. WAIVERS OF FAR's

The establishment/designation of special use airspace does not, in itself, waive any part of the Federal Aviation Regulations.

27-6. ENVIRONMENTAL ASSESSMENT

Special use airspace actions are subject to environmental assessments and procedures if the floor of the proposed area is below 3,000 feet AGL or if supersonic flight is anticipated at any altitude. Compliance with the National Environmental Policy Act (NEPA) is the responsibility of the proponent under the lead agency concept. (See FAA Order 1050.1.)

27-7. COORDINATION OF PROPOSALS

Prior to submission for approval, military proponents of special use airspace will coordinate proposals with

locally affected ATC facilities and military units, local FAA representatives/liaison officers where assigned, and the ARTCC having jurisdiction over the affected airspace. All coordination of nonmilitary proposals will be accomplished by the regional Air Traffic division.

27-8. REGIONAL ACTION

Special use airspace rulemaking actions shall be processed in accordance with the procedures prescribed in Part 11 and in Part 1 and Part 7 of this Order. Nonrulemaking actions shall be processed in accordance with the procedures prescribed in Part 1 and this part. Upon receipt of a special use airspace proposal, the region shall:

a. Review the proposal for completeness and sufficient justification.

b. Coordinate the proposal to identify conflicts with the requirements of other airspace users. Give special attention to compatible airspace use relative to existing and planned airports and their associated airspace requirements.

c. Circularize the proposal in accordance with the procedures specified in Part 1 and the chapter of this part applicable to the type special use airspace proposed. Additionally, if it would increase the burden on the public and/or coordination and informal discussions indicate it will be controversial, circularize the proposal to interested persons under the procedures of Chapter 2, Section 2. Proposed actions which clearly do not impact aviation need not be circularized nor issued as an NPRM.

d. When comments, review, and/or coordination indicate that the proposal will be controversial, an informal airspace meeting may be scheduled in accordance with Chapter 2, Section 3 of this Order.

e. When conclusions are reached, complete processing as specified in the appropriate chapter of this part. When required, forward the proposal to ATP-200 for action. The package shall include at the minimum the region's recommendations, justification, documentation of regional actions, copies of pertinent correspondence, original sectional charts showing proper coordinates, and all other related information contained in Section 3 of this chapter that could be useful to make a determination or complete the coordination.

27-9. JOINT USE

Special use airspace should be available for use by nonparticipating aircraft when all or part of the airspace is not required for its prescribed purpose provided there is no derogation to the using agency's mission. Because of their small size, geographic location, or high degree of utilization, some areas are impractical for joint use. Joint use procedures for specific types of airspace are contained in the appropriate chapter of this part.

27-10. CONTROLLING AGENCY

Joint use of special use airspace requires the assignment of a controlling agency. The assigned facility is:

a. For joint use restricted areas, the ATC facility that may authorize transit through or flight within a restricted

area in accordance with a joint use letter (reference Part 73.17).

b. For other than joint use restricted areas, the FAA or the military ATC facility.

27-11. USING AGENCY

Normally, the using agency is the agency, organization, or military command whose activity established the requirement for the special use airspace. An ATC facility may be the using agency for joint use areas when the facility is specified in a letter of procedure as having priority for use of the area.

27-12. CHARTING AND PUBLICATION

With the exception of Controlled Firing Areas and an optional requirement for temporary MOA's and temporary restricted areas, special use airspace shall be reflected in aeronautical publications and depicted on aeronautical charts. New and revised areas normally become effective on the U.S. 56-day cycle publication dates (see Part 1).

27-13 thru 27-19. RESERVED

Section 2. DIMENSIONS

27-20. GENERAL

Special use airspace is described in terms of horizontal (boundaries) and vertical (altitude) dimensions, effective for a specified period of time.

27-21. HORIZONTAL LIMITS

The horizontal limits of special use airspace are defined by geographic coordinates or other appropriate references that clearly describe their boundaries. Where it is difficult to establish boundaries easily discernible from the air, the area may be changed to allow the boundary to be located along some charted prominent terrain feature; i.e., rivers, highways, railroad tracks, etc. Except for temporary areas, boundaries shall not be described as "along the boundary" of another airspace area.

27-22. VERTICAL LIMITS

a. Vertical limits shall be established, as necessary, to contain the planned activities. Stratification to enhance joint use is permitted and encouraged.

b. Within areas solely containing aircraft operations, altitudes at or above 18,000 feet MSL shall be expressed as flight levels. Within areas containing other than aircraft operations, altitudes at or above 18,000 feet MSL shall be expressed as feet above mean sea level (MSL).

c. Below 18,000 feet MSL, altitudes shall be expressed to the nearest 100 feet. Above 18,000 feet MSL, altitudes/flight levels shall be expressed to the nearest 500 feet.

d. Procedures for determining the floor of special use airspace vary according to area type and are contained in the appropriate chapters of this part.

e. Ceilings are expressed as flight levels or feet above MSL. Unless otherwise specified, the word "to" an

altitude or flight level means "to and including" that altitude or flight level. If the vertical limit does not include the altitude or flight level, the ceiling shall be expressed as "to but not including."

27-23. TIMES OF USE

a. Close scrutiny of proposed times of use is essential to good management of special use airspace. Publication of unrealistic usage times unnecessarily discourages pilots of nonparticipating aircraft from requesting transit or activity information. In determining the times of use, the guiding factors are equally to:

1. Assign the minimum period of time necessary to meet the requirements of the using agency.

2. Enhance real time joint use of special use airspace by conveying to nonparticipants definite and/or probable periods of inactivity. For areas that permit transit without specific approval, this must also be weighed against the opposite effect of presumed inactivity luring nonparticipants into a lack of vigilance in the area.

3. Keep to a minimum the amount of information necessary to publish and chart special use airspace areas.

b. Times of use shall be expressed using the terms or combinations of the terms indicated below and should reflect normal use for the majority of the time. When a using agency has knowledge of significant seasonal differences in usage requirements, different times of use may be established as appropriate; e.g., "Sep–Apr, Mon–Fri 0800–1700" and "May–Aug, Daily Sunrise–2300."

Days of the week and/or months of the year should be indicated as appropriate.

1. Sunrise and sunset:

2. Specified time: Local time using the 24-hour clock.

3. Intermittent: Requires an associated time or NOTAM provision. Not applicable to restricted areas without a "by NOTAM" provision.

4. Continuous: Use only if justification exists for utilization 24 hours a day, 7 days a week. Not applicable to warning areas or combined use with 1 and 2 above.

5. By NOTAM:

(a) May be used alone or in combination with 1, 2, and 3 above when anticipated usage cannot be determined, or when the nature of the using agency's mission requires infrequent and/or erratic utilization. Use of the "by NOTAM" provision is not intended to provide solely for the "possibility of unforeseen short range requirements" of the using agency.

(b) Shall be applicable to an entire area and not only to a portion thereof. When time of use varies significantly from one portion of an area to another, action should be initiated to have dissimilar portions identified by subdivision or reestablished as separate areas.

(c) Activation by NOTAM should normally be at least 24 hours in advance. This may be reduced if justified to gain an operational advantage.

27-24 thru 27-29. RESERVED

Section 3. CONTENT OF PROPOSALS

27-30. DESCRIPTION

a. Title – A short definitive description of what is proposed.

b. Boundaries – A definitive description of the proposed area's perimeter in accordance with paragraph 27-21.

c. Altitudes – Minimum and maximum altitudes in accordance with paragraph 27-22.

d. Times of use – Local time operations are normally expected to begin and end in accordance with paragraph 27-23.

e. Controlling agency – Not applicable when the airspace will not be joint use.

f. Using agency.

27-31. COORDINATION

Furnish a resume of the coordination accomplished in accordance with paragraph 27-7. For new areas, indicate that shared use and/or expansion of existing areas has been explored and determined unacceptable to satisfy the requirement for the proposed airspace. (See paragraph 27-4.)

27-32. JUSTIFICATION

The need for the proposed airspace must be definitive and able to support any resultant imposition on nonparticipants or affordance of priority to the special use proponent. Requirements, such as "the containment of military activity," or "in support of national defense," or other similar statements, in and of themselves are inadequate.

27-33. ACTIVITIES

Activities include:

a. A detailed list of activities to be conducted by each organization proposing to use the area.

b. Local time daily operations normally are scheduled to begin and end. Include weather requirements if it is a condition of use. (See paragraph 27-23.)

c. Number of hours (daily) the area will be used.

d. Days per week, weeks per month, or months per year, as appropriate, the area will be used.

e. If the area is to be used for aircraft operations, include:

1. The number and type of aircraft normally involved in performing activities for which the area is established.

2. A statement as to whether ground or airborne radar surveillance will be used during the operation. If radar surveillance will be used, indicate on the chart where the radar coverage is available.

3. The altitudes to be used in daily aircraft operations (expressed in feet MSL or flight levels as appropriate). For each type of activity, include the altitudes (or blocks of altitudes) and the number of hours these altitudes will be used. (See paragraph 27-22.)

4. The intentions regarding flight at supersonic speeds.

f. If the area is to be used for surface firing (See paragraph 27-22.):

1. Type weapon/s to be fired with their associated firing fans, footprints, buffers, etc.

2. Maximum altitude of surface firing (expressed in feet MSL) used in accomplishing required operations.

3. Number of hours highest altitude is to be used annually.

4. Altitude normally used for daily firing operations (expressed in feet MSL).

5. A detailed explanation of the peak hourly, daily, weekly, and monthly volume of firing.

g. Any special requirements.

27-34. SAFETY CONSIDERATIONS

Include an explanation as to how each of the following, if applicable, is to be accomplished.

a. How activity will be confined within the proposed area.

b. Procedures for handling malfunctions.

c. Ordnance [sic] trajectory envelope.

27-35. COMMUNICATIONS AND RADAR

Specify the availability and proposed utilization of ground and/or airborne communications coverage; e.g. range control, military radar unit (MRU), airborne radar unit (ARU), Fleet Area Control and Surveillance Facility (FACSFAC).

27-36. ENVIRONMENTAL AND LAND USE INFORMATION

a. Identify the lead agency or appropriate representative responsible for compliance with NEPA.

b. Certify NEPA compliance. If delayed, must be in hand by FAA prior to issuance of final rule or publication cutoff date for nonrulemaking action.

c. Furnish the names, addresses, and telephone numbers of persons to whom comments on environmental and land use aspects may be submitted.

d. Proposals requesting designation below 1,200 feet AGL which have underlying private or public use land must indicate agreement to provide reasonable and timely aerial access to such land. Prohibited and restricted area proposals requesting designation from the surface shall indicate that the proponent either owns, leases, or by agreement controls the underlying surface.

27-37. GRAPHIC DISPLAY

Proposals shall include a graphic presentation of the proposed area on maps and aeronautical charts as appropriate. If applicable, the presentation should indicate those areas owned, leased, or controlled by the using agency. All proposals should, as a minimum, be depicted on an original Sectional Aeronautical Chart.

a. If the area is to contain aircraft operations, the following shall be depicted:

1. The location and the representative pattern of firing and/or bombing runs. If appropriate, show where run begins, lock-on point, where firing, if any, commences and ends, and release point and pullup points.

2. Impact areas.

b. If the area is to contain surface-to-surface or surface-to-air firings, the following shall be depicted:

1. Firing points.

2. Impact areas.

3. Perimeter of firing fans for each type weapon used.

27-38. JOINT USE

State whether the area will be joint use, and if not, include justification.

27-39. REMARKS

Specify any pertinent data not indicated elsewhere.

27-40 thru 27-49. RESERVED.

Section 4. REVIEW AND ANALYSIS

27-50. ANNUAL REVIEW

ATP-200 and regional Air Traffic divisions shall systematically and periodically review special use airspace within their area of jurisdiction, and if required, initiate action to alter or revoke such airspace. As a minimum, the utilization of each area of special use airspace, except prohibited and warning areas, shall be reviewed on an annual basis.

27-51. FORMAL/INFORMAL REVIEW

The review of special use airspace may be accomplished through formal or informal procedures. Formal reviews are conducted by special use airspace teams that are established when determined to be appropriate by ATP-200 or a regional Air Traffic division. Informal reviews are conducted on a continuous basis by all agency personnel engaged in handling special use airspace.

27-52. TEAM REVIEW

Formal airspace reviews should be conducted by a special use airspace team that consists of three or more members. In matters involving Flight Standards, a representative

from the Flight Standards division should be invited to participate as a member of the team. If required, representatives of more than one region can participate as members of the team. The team chairman should be an Air Traffic specialist of ATP-200 or the regional Air Traffic division. The selection and use of the special use airspace team should be on an "as required" basis, and a particular team shall be dissolved when its study is completed. Normally, team efforts should be directed toward problem areas evaluating the need for additional assignments of special use airspace and conducting reviews of selected special use areas for the purpose of developing recommendations for retention, alteration, or revocation based upon changing user requirements and/or actual utilization.

27-53. TEAM RESPONSIBILITIES

The team shall act as a fact finding body for gathering complete information concerning the requirement for and use of special use airspace. It should determine the actual hours of use, altitudes and geographical area used, types of activities conducted, and any other pertinent information. Teams should not accept statements from users based on conjecture regarding the present or future usage of an area. Instead, any stated requirement must be based on factual data.

27-54. DUTIES OF CHAIRMAN

In addition to the above general responsibilities of a special use airspace review team, the team chairman shall accomplish the following:

a. Prior to the team's visit to the area, coordinate with appropriate military commands and/or civil users. Coordination should be initiated far enough in advance of the team's visit to provide local representatives with sufficient time to prepare required data. Initial coordination with the military shall be effected through the appropriate regional military representative.

b. If deemed necessary, schedule an informal airspace meeting near the location of the area under study. Such a meeting would allow the users and other interested persons an opportunity to present their position and offer recommendations.

27-55. TEAM REPORT

On completion of the review, the team shall analyze the information obtained and develop its recommendations. The team findings shall be forwarded through the regional Air Traffic division to the regional military representative for appropriate action. A copy shall be sent to ATP-200 and to the affected ATC facility/s. The report should include:

a. A summary of the positions of all interested civil and military users to include operational requirements and recommendations.

b. The findings, conclusions, and recommendations of the team.

c. Positions submitted in writing at a formal special use airspace review shall be attached to the team report.

27-56 TEAM REPORT RESPONSES

The appropriate regional military representative should provide a response to the team report within 60 days. If the military concurs with the team's findings, conclusions, and recommendations, the Air Traffic division should initiate any appropriate airspace action and advise ATP-200. If the Air Traffic division and the military are unable to reach an agreement on the team's report, the Air Traffic division should forward the military position along with the Air Traffic division recommendation to ATP-200 for a determination. Also, provide a copy of the Air Traffic division recommendation to the appropriate military representative.

Chapter 31. MILITARY OPERATIONS AREAS (MOA'S)
Section 1. POLICY

31-1. DEFINITION

A military operations area (MOA) is airspace established outside Class A airspace to separate/segregate certain nonhazardous military activities from IFR traffic and to identify for VFR traffic where these activities are conducted.

31-2. PURPOSE

The military has a continuing requirement to conduct nonhazardous training activities, such as air combat maneuvers, air intercepts, acrobatics, low altitude tactics, etc. MOA's are established to contain these activities in airspace as free as practicable from nonparticipating aircraft.

31-3. IDENTIFICATION

MOA's shall be identified by the use of a nickname from a geographical location or any other common name; e.g., "GATOR" or "FORT STEWART," and if desired, further identified in numerical sequence; e.g., "MOODY 1," "MOODY 2," etc. Cardinal points, letters, or "high" and "low" may be used to identify subsections; e.g., "GATOR LOW." Lengthy composites of the above are cumbersome for communications and charting and should be avoided.

31-4. MOA FLOOR

If a valid requirement exists and there is minimal adverse aeronautical effect on the overall system, MOA's can be established below 1,200 feet AGL. Determination of effect must include special consideration for aerial access to private and public use land and for terminal VFR and IFR flight operations. At a minimum, provisions must be

made to accommodate instrument arrivals/departures with minimum delay, and the MOA shall exclude the airspace 1,500 feet AGL and below within a 3 nautical mile radius of airports available for public use.

31-5 LOCATION

While MOA's should be located to create minimum adverse impact on nonparticipating aircraft operations, full consideration shall be given to the military requirement. Where necessary, feasible, and a significant operational advantage will not be lost, airspace configurations may be changed and routes realigned or revoked to accommodate establishment of MOA's. Establishment of terminal or en route airspace to coincide with or supersede existing MOA's shall be avoided unless a significant operational advantage can be gained. MOA's shall not be established off-shore outside the U.S. 12 NM territorial limit. Additionally, and to the extent possible, locate MOA's:

a. Within radar and communication coverage of an ATC facility or Military Radar Unit (MRU).

b. Within 100 miles of the base of flight origin.

c. Outside terminal airspace and away from Federal airways and regularly used VFR routes.

31-6. CONTROLLED AIRSPACE

Designate controlled airspace to coincide with MOA's only if IFR ATC service is to be provided in that airspace by an FAA or military ATC facility.

31-7. JOINT USE

MOA'S, in effect, are always joint use in that VFR aircraft are not denied access and that IFR aircraft may be routed

through the airspace when approved separation can be provided from MOA activity. Procedures for use of the airspace by nonparticipating IFR traffic shall be set forth in letters of agreement executed between the controlling and the using agencies. Such letters shall also include procedures for the appropriate flight service stations to be provided real-time active/inactive status of the MOA.

31-8 thru 31-19. RESERVED

[LOGO]
U.S. Departmentof Transportation

Federal Aviation Administration

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Special Military Operations

November 3, 1998
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Chapter 9. MILITARY OPERATIONS REQUIREMENTS

Section 1. CRITERIA

9-1-1. PURPOSE

This chapter prescribes policy, criteria, administrative and operating procedures pertaining to airspace for military operations/training activities during planned exercises and daily training missions/research, development, test and evaluation (RDT&E).

9-1-2. POLICY

The FAA recognizes that the military has a continuing requirement to conduct certain training and RDT&E activities within airspace as free from other aircraft as is practicable. Therefore, certain special military training and/or RDT&E operations shall be conducted within ATC assigned airspace (ATCAA), Altitude Reservation (ALTRV), military operations areas (MOA), restricted areas, warning areas, and IFR military training routes (IR) so that these activities are separated from other IFR traffic in controlled airspace. Flights to/from such areas shall be under the control of either FAA or military ATC facilities

to the maximum extent possible. The policies and procedures for designating special use airspace (SUA) are contained in FAA Order 7400.2, Procedures for Handling Airspace Matters.

9-1-3. AIRSPACE DESCRIPTION

Airspace utilized for military operations shall be described in terms of lateral and vertical dimensions and specific times of use. In developing the dimensions and times of use for SUA and ATCAA descriptions, apply the criteria contained in Chapter 27, Section 2, of FAA Order 7400.2.

9-1-4. LIMITATIONS

a. The designation of SUA or ATCAA shall be limited to the minimum number of areas necessary to support operational requirements.

b. To the extent possible, the area shall be designed so as to accommodate the maximum number of different types of military activities in the same airspace area. The military shall provide procedures for joint-use scheduling in an area.

c. To facilitate joint-use of SUA/ATCAA, activation shall be limited to the minimum area, altitude, and time required for the activity/mission.

9-1-5. LETTERS OF AGREEMENT/PROCEDURE

a. Letters of agreement/procedure governing SUA shall include as a minimum:

1. Scheduling procedures and positive updating, to include requirement and time parameters for providing these updates to the schedule.

2. Activation/deactivation procedures.

3. Activation/deactivation times.

b. The letters of agreement/procedure governing special conditions of use and procedures for each SUA and ATCAA areas shall be authorized (signed) by the affected ATC facility manager and the military representative of the originating/scheduling activity.

c. Each SUA/ATCAA area will have a designated military office responsible for scheduling all military activities within that area. Areas shall not be used for military activities unless scheduled by the responsible military office.

d. When the use of SUA/ATCAA has been requested in accordance with agreed upon procedures, the military scheduling unit is responsible for determining priority of use and for advising all users of the operational procedures restrictions or other conditions contained in the letters of agreement/procedure.

* * *

Section 4. IR ROUTE DEFINITION

11-4-1. ROUTE WIDTH

Widths of route segments shall be defined by the military. In all cases, the route width shall be of sufficient size to contain all planned activities. For cartographical purposes, the standard route width shall be 5NM.

11-4-2. ROUTE ALIGNMENT

Route alignment criteria shall be as follows:

a. All IR's to be flown at/below 1,500 feet AGL should be designed to permit aircraft flying the route to avoid chartered, uncontrolled airports by 3 NM or 1,500 feet. Where it is impractical to comply with this criteria, procedures shall be established by the scheduling/originating activity to minimize conflict with airport traffic; i.e., identify volume and type traffic, highlight need for increased vigilance commensurate with situation, maintain liaison with airport owner/operator, include appropriate cautionary note in route description: "Avoid flight within 1,500 feet or 3 NM of airport when practicable," etc.

b. Subsequent charting of airports within 3 NM of an MTR may require route realignment to conform to the criteria established in subparagraph a.

c. Routes should be aligned to avoid Class D and Class B airspace.

d. During development of routes, consideration should be given to potential conflict with published and unpublished instrument procedures/routes.

e. Routes should be aligned so that disturbance to persons or property on the ground is minimized.

11-4-3. ALTITUDES

a. Altitudes shall be established for each route segment. Routes shall contain the minimum number of altitudes commensurate with mission requirements and may be specified singly, in blocks, or a range from which ATC assignment may be made. Minimum altitudes for each route segment shall be established by the military. Altitude information shall be reflected on FAA Form 7110-4 as follows:

1. IR's should depict the highest altitude in MSL terms. The lowest altitude may be depicted in either MSL or AGL terms.

2. An altitude block shall be depicted as the lowest altitude followed by a "B" followed by the highest altitude.

EXAMPLE–
5 AGL B 20 MSL
40 MSL B 60 MSL
SFC B 50 MSL

3. A range of altitudes from which ATC may assign a single altitude shall be depicted as the lowest altitude, in MSL terms, followed by a "–" followed by the highest altitude in MSL terms (when acceptable to the mission).

EXAMPLE–
20 MSL – 50 MSL

b. Unless the route segment is clearly annotated, "for use in VMC conditions only," each route segment shall contain an altitude that is suitable for flight in IMC

and can be used in the event of an aircraft systems failure. This altitude shall be referred to as the IFR altitude and may be contrary to 14 CFR 91.119 when specifically authorized by appropriate military authority. The IFR altitude shall always be depicted in MSL terms. In no case will flight operations be conducted at altitudes less than those specified in 14 CFR 91.177. In the absence of an established IFR altitude, the IFR altitude is the highest altitude designated for the route segment as depicted in the route description.

c. All altitudes shall be established by the military. The military may use other than FAA standards for establishing IFR altitudes for route segments.

d. When practical, the designated exit fix altitude shall be within an area of radio coverage. When it is determined that ATC impact or other constraints preclude the exit fix altitude being established within radio coverage, an altitude below radio coverage may be utilized provided procedures for routinely exiting the route; i.e., pre-coordinated clearances, stereo routes, and actions to be taken by the pilot in the event two-way communications are lost, are covered in a letter of agreement.

* * *

[d] Clear weather symbol (O).

[e] Group Two remarks if appropriate.

EXAMPLE–

⊕ *IR101E1602X18450AR20*
HFAKR1233 . . . (etc.)

(3) Flight plans where the route of flight enters more than one ARTCC's area and an IR is completed after

the aircraft has exited the ARTCC's area where the aircraft departed:

[a] Clear weather symbol (O).

[b] IR designator.

[c] Group One remarks.

[d] Group Two remarks if appropriate.

EXAMPLE–

O *IR101E1802X1845*
MARSA . . . (etc.)

(4) Flight plans where the route of flight enters more than one ARTCC's area and an IR is completed after the aircraft has exited the ARTCC's area where the aircraft departed, and the Group Two remarks are concluded before exiting the ARTCC's area in which the flight departed:

[a] Overcast weather symbol (⊕).

[b] Group two remarks.

[c] Clear weather symbol (O).

[d] IR designator.

[e] Group One remarks.

EXAMPLE–

⊕ *AR20HFAKR1233OIR101E*
1802X1845

11-6-6. IR USE DENIAL

ATC facilities should not deny the use of IR's. ATC delays may be imposed when conditions preclude route usage as

scheduled. When delays are anticipated, ATC facilities shall advise the pilot/scheduling unit of the expected delay and the reasons for the delay.

11-6-7. ROUTE ADHERENCE

Pilots shall be responsible for:

a. Remaining within the confines of the published route width and altitude.

b. Obtaining a specific ATC entry clearance from the appropriate ATC facility prior to entering the IR.

c. Unless otherwise agreed to in a letter of agreement, obtaining an IFR ATC exit clearance prior to exiting the IR.

d. Adhering to the provisions of 14 CFR 91.119 (Minimum Safe Altitude, General). Routes may be flown IFR contrary to 14 CFR 91.177 (Minimum Altitude for IFR Operations) when specifically authorized by the appropriate military authority.

11-6-8. SPEED AUTHORIZATION

Flight shall be conducted at the minimum speed compatible with mission requirements. When exiting an MTR below 10,000 feet MSL, the flight shall comply with 14 CFR 91.117 (aircraft speed) or the current authorization granted to DOD.

11-6-9. ENTRY/EXIT PROCEDURES

All IR entries and exits shall be accomplished at published entry and exit points, or published alternate entry and exit points, unless the pilot amends/cancels his IFR flight plan.

11-6-10. COMMUNICATION FAILURE

Unless otherwise covered in a letter of agreement, each pilot who has a two-way radio communications failure when operating on an IR (between the entry and exit point) shall comply as follows:

a. VFR Conditions. If the failure occurs in VFR conditions, or if VFR conditions are encountered after the failure, each pilot shall continue the flight VFR and land as soon as practical. (14 CFR 91.127b /DOD IFR Supplement.)

b. IFR Conditions. If the failure occurs in IFR conditions, or if subparagraph a above cannot be complied with, each pilot shall:

1. Maintain to the exit/alternate exit point the higher of the following:

(a) The minimum IFR altitude for each of the remaining route segment(s).

(b) The highest altitude assigned in the last ATC clearance.

* * *

Appendix 18.

SPEED AUTHORIZATION GRANTED TO DOD

May 18, 1978

Mr. Paul H. Riley
Alternate DOD Representative to FAA
Deputy Assistant Secretary of Defense
The Pentagon
Washington, D.C. 20330

Dear Mr. Riley:

Section 91.70(a) of the Federal Aviation Regulations (FAR) provides that, unless otherwise authorized by the Administrator of the Federal Aviation Administration (FAA), no person may operate an aircraft below 10,000 feet mean sea level (MSL) at an indicated airspeed of more than 250 knots.

The regulation grants an exception to aircraft having flight characteristics which preclude safe operation at speeds below 250 knots by providing that if the minimum safe airspeed for any particular operation is greater than the maximum speed prescribed, the aircraft may be operated at that minimum safe airspeed.

In recognition of the fact that certain military operational and training requirements cannot be met under the terms of the regulation, the Department of the Navy and the Department of the Air Force have been authorized since November, 1967, to operate aircraft below 10,000 feet MSL at an indicated airspeed of more than 250 knots to the extent such high-speed operations were necessary in the accomplishment of air combat maneuvers and tactics, low-level navigation, low-level reconnaissance and intercept, weapons delivery tactics, flight test and evaluation,

undergraduate pilot training, actual or simulated alert missions, and other flight operations of a similar nature.

Our authorization of November 1967, to each service, was rescinded and reissued to the Department of Defense (DOD) on June 8, 1976. The June 1976 authorization was rescinded and reissued on February 25, 1977. The February 1977 authorization was rescinded and reissued on December 19, 1977. Provisions are now needed to accommodate military requirements while airspace actions are pending. Therefore, effective immediately, the December 19, 1977, authorization is rescinded and reissued as follows:

Operations below 10,000 feet MSL at an indicated airspeed in excess of 250 knots, in noncompliance with FAR 91.70(a), are authorized for military aircraft, including Reserve and Air National Guard components, only under the following conditions:

a. Within restricted areas.

b. Within military operations areas.

c. When operating within large scale exercises or on short term special missions. Coordination will be effected to insure awareness on the part of the nonparticipating flying public.

d. When operating on DOD/FAA mutually developed and published IFR routes. The military necessity for each route and for the extent of use of each route is to be reviewed and approved by the appropriate military headquarters.

e. When operating on DOD developed and published VFR routes. Such routes shall be established for

specific missions and used only by designated units when the provisions of a. through d. above will not accommodate the required national defense mission as determined by appropriate military headquarters. Routes are to be developed and published in accordance with DOD/FAA mutually developed criteria.

f. In the event provisions of a. through c. cannot be complied with, the appropriate military headquarters may authorize flight operations within defined airspace in noncompliance with FAR 91.70 as it considers necessary to accomplish the national defense mission. This provision is intended to accommodate speed requirements on an interim basis within a defined area for which an area/route proposal has been coordinated and concurred in by appropriate military/FAA regional authority but not yet published.

FEDERAL AVIATION ACT

1684-7

HEARINGS
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES
EIGHTY-FIFTH CONGRESS
SECOND SESSION
ON
H. R. 12616

A BILL TO CREATE AN INDEPENDENT FEDERAL AVIATION AGENCY, TO PROVIDE FOR THE SAFE AND EFFICIENT USE OF THE AIRSPACE BY BOTH CIVIL AND MILITARY OPERATIONS, AND TO PROVIDE FOR THE REGULATION AND PROMOTION OF CIVIL AVIATION IN SUCH MANNER AS TO BEST FOSTER ITS DEVELOPMENT AND SAFETY

JUNE 24, 25, 26, 27, 30,
JULY 1, 2, 8, AND 24, 1958

Printed for the use of the Committee on
Interstate and Foreign Commerce

[LOGO]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1958

* * *

Mr. KITCHIN. Getting right back to the point you just brought up, that is the fact: That it takes a great deal of experience to acquire this type of instrument rating, do

you think that in the meantime there should be some restriction on general aircraft coming into crowded commercial airports without instrument control?

Dr. BRYAN. In VFR conditions, if the traffic is such that the airport is not closed to flying farmers and to business fliers, we see no particular need for restrictions.

I and a great many people in my organization go into Chicago Midway day in and day out, as I did yesterday, with a measured ceiling of 1,200 feet, along with the airlines, and everybody else; and we have no particular problem.

Mr. KITCHIN. Just one more question, Mr. Chairman.

Under the terms of the proposed legislation, it is my understanding that there is no term for the Administrator to serve. Now, I will ask this as your personal opinion:

Do you think that the Administrator of this new Agency should be a person subject to the whims of the President?

Should he be given a strict term of years in which to serve, or what is your concept on that?

Dr. BRYAN. If he is appointed by the President and responsible to the President, the President should have the authority to discontinue his services.

Mr. KITCHIN. Then you don't recognize the fact that there might possibly be some partisanship exercised by a change of administration when a good man there might be changed just for a political whim?

Dr. BRYAN. I think the position is responsible enough and on a high enough level so that it is very comparable to the Cabinet positions.

Mr. KITCHIN. And should be an appointee of the President subject to change at his desire, or any new President's desire?

Dr. BRYAN. That is right. That is a personal opinion, again.

Mr. ROBERTS. I will recognize the gentleman from California.

Mr. YOUNGER. There are two points I would like to clear up. After listening to your answers to some of the other questions, I have this question:

One: Is this item 3 where you say it is the consensus of the General Aviation Facilities Planning Group that civil control of such new independent agency be assured, do you mean by that that there should be an amendment to this act which would provide that the Administrator must be a civilian?

That is the only way you can assure it, because, otherwise, it is permissive now. The President could appoint a military man or he could appoint a civilian. The only way you can assure that would be by an amendment stating that the Administrator must be a civilian.

What is your thought on that?

Dr. BRYAN. Our group thought we could trust the Congress to write the bill in its final form which in their best judgment would assure that.

We simply wanted to say that we feel it is highly desirable, just as in the same sense the secretary of Defense is a civilian. We feel that that same sort of general philosophy should apply to the Administrator.

Now, our group did not specifically want to go on record as saying that the President couldn't appoint a military man to the position if, in his judgment, he was the best man available.

Mr. YOUNGER. In other words, if the committee wrote into its committee report that it is the consensus of the committee that the Administrator should be a civilian, do you think that would suffice on this question rather than an amendment to the bill itself?

Dr. BRYAN. Our group, I think, would agree with that; yes.

Mr. YOUNGER. Now, do I understand your personal recommendation is against an Administrator and for a board in control of the Agency?

Dr. BRYAN. If I were starting from scratch –

Mr. YOUNGER. We are starting from scratch.

Dr. BRYAN. (continuing). And had that decision to make personally, I would think a board somewhat similar to the Interstate Commerce Commission as far as authority and so forth is concerned, would be desirable.

Mr. YOUNGER. That is all.

Mr. ROBERTS. Mr. Wilson?

Mr. WILSON. Yes, Mr. Chairman.

Dr. Bryan, you understand that under this proposed aviation agency, each military field in this country would have in its control tower directing the flights of every military airplane in the country, employees of the – civilian employees of the Agency, not under the control of the commanding officer of that particular military field.

Now, there are, as you know, just thousands of military flights daily in this country. Generally, at the SAC bases, the planes are ready to go on a few moments' notice, and the same way at the interceptor bases.

With all this military activity, you still feel that there should be no actual participation by the military in the administration of this act other than as a liaison?

Dr. BRYAN. I think that is the way to accomplish it.

As you are well aware now, we are in effect doing about the same sort of thing as far as flight plans and civil control of the airways are concerned. It is largely civil.

Mr. WILSON. Not as far as the operation of SAC bases and as far as the operation of the interceptor bases. CAA has very little to say over the control of those flights.

Dr. BRYAN. That is right.

Mr. WILSON. Yes –

Dr. BRYAN. That is operational.

Mr. WILSON. And I agree that with the problems that have been created by the increasing flights of military and civilian aircraft we are going to have unified control. I don't understand your opposition to even the appointment of a Deputy Administrator, who would be a military

man. I think we are going to have to have a blending of both military and civilian activity if we are going to have successful operation that the military can live with under this act.

I was interested in your statement that under wartime conditions you felt that we should go back to the old system where you would have divided authority on control of the air in that the military would then control its flights and the civil authorities would control the civil flights.

You would have utter chaos, in my opinion, in wartime, when there will be increased numbers of military flights, if you didn't have a single authority such as you have in peacetime.

Dr. BRYAN. I think you must have misunderstood me, or perhaps I didn't adequately express myself with respect to that.

As I see it, there are about three general situations.

You have one situation in which the military is running their own show and they are predominate and have to be by the very nature of the military operation.

You have a joint situation in which we use the civil airways, for instance, jointly with the military and civil aircraft; transport operations, for instance.

Then you have a third situation in which I think civil aviation doesn't need to be subjected to other than general military regulations during a time of emergency; I mean the same regulations as anybody, as a citizen would be subject to, generally speaking.

And I think you are perfectly correct and I didn't mean to not infer that in time of war some aspects of our control would have to be greater than they are now by the very reason of the war situation.

Mr. WILSON. In other words, it is your feeling that in wartime, commercial aviation, as we call it, and military aviation should probably be under one central control and the other aspects of aviation should be under limited control by the military.

Dr. BRYAN. Yes. I think what we need is a mobilization plan rapidly arrived at by the new Federal agency if it is set up, and the military so that they know where the traffic controllers are going to report in time of war, and so forth, so that they know what regulation you have got to submit to commercial flight schools or crop dusters and agricultural aviation.

Mr. WILSON. I thought your suggestion was good that immediately on the formation of this Agency a plan be formulated by the military and civilian operators, a plan of action for taking over when the emergency occurs. I think that has got to be pretty well understood. A plan of action has to be immediately laid out. But it just seems to me in laying out the plan that you are going to need certain military representation in that Agency if you are going to get an adequate plan drawn up.

Dr. BRYAN. Well, I would go along with the need. I think maybe we might disagree as to how it should be accomplished.

Mr. WILSON. Thank you, Mr. Chairman.

Mr. ROBERTS. Thank you, Doctor. Thank you very much.

Our next witness will be Mr. Stewart Tipton, president of the Air Transport Association, Washington, D.C.

The Chair would like to state it is not my intention or purpose to foreclose anyone, but we do have a number of witnesses, some from out of the city, and I understand that we expect rollcalls this afternoon on the floor. I would appreciate it if you would cooperate with the chair so that we can move along as fast as we can.

Mr. Tipton.

* * *

STATEMENT OF A. B. McMULLEN, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF STATE AVIATION OFFICIALS

Mr. MCMULLEN. Mr. Chairman, I appreciate the opportunity to submit the views of the association and recommendations in support of H. R. 12616, and I would suggest that you turn to the organization chart on the very back page of my statement which if we review first

* * *

to the Administrator," and such military personnel as may be required for the proper discharge of his responsibility.

On June 13, 1958, the President, in a message to Congress, stated:

* * * legislation should * * * impose on the Administrator the obligation to provide for the assignment and participation of military personnel within the Agency in

such a manner as to assure that national defense interests as well as the needs of all aircraft for safe and efficient traffic management, will be considered in the conduct of the Agency's operations. The development of a genuine civil-military partnership, in which all agencies and interests concerned with aviation may place full confidence –

and I emphasize that full confidence –

will be essential to the success of the Federal Aviation Agency.

We heartily agree that there should be the closest working relationship between the Department of Defense and the new Agency in many fields of aviation administration, such as research and development – air traffic control – and the installation, maintenance, and operation of air navigation aids, and that a real partnership, as proposed by the President, is desirable; but, we are concerned about the type of partnership, based on long experience.

There is an old story about a butcher who was advertising rabbit sausage. When authorities forced him to tell what he put in the sausage, he admitted it was 50 percent rabbit and 50 percent horsemeat – upon further questioning, it was discovered that the butcher's idea of 50-50 was I horse and 1 rabbit.

In this new partnership, will the military become a horse, and civil aviation a rabbit?

If the new law specifically provides for military advisers or partners in the Federal Aviation Agency – and if, as is now the case in airspace matters, the Administrator (or his representative) acts as an impartial judge or supervisor of the airspace, objectively deciding who shall

use what portions of the airspace, without specifically representing the civil aviation industry – who, or what Federal agency is going to be in a position to effectively and forcefully speak for and represent civil aviation when and where military-civil interests are in competition or conflict?

The Department of Defense already is represented in the executive at the White House of course and has Cabinet status. There are no civilian representatives of civil aviation on the staff of the Department of Defense, but we are proposing here that sort of a fifth column be established in the Federal Aviation Agency by the military, and we are very much concerned as to how this will operate.

If the Agency should have as a Deputy Administrator an active military officer appointed by the President, to assure adequate military participation in the affairs of the Agency (as suggested by the department of Defense), should there not also be a Deputy Administrator for civil aviation whose primary responsibilities should be to assure adequate participation by the civil aviation industry?

The Administrator of this Agency would normally be out of his office a considerable part of the time if he does his job like he should. He should be attending conferences, meeting not only nationally but in many cases internationally which would require him to be absent from the office.

If the one deputy is a military officer, he automatically, I would assume, would become the administrator in the absence of the Administrator, and I do not think

anyone in the aviation industry would favor such an arrangement.

In the proposal I am making here, you would in effect have 2 Deputies, 1 Deputy without limitation, who would be second in command, and in the absence of the Administrator would normally assume the Administrator's duties, whereas the other Administrator for Military Affairs would be limited to the coordination and direction of those matters that the Administrator wished to assign him in direct relationship to the military.

At the planning and policymaking levels, adequate and equal representation by military and civil aviation interests should be assured in an advisory capacity. Perhaps a joint civil-military-industry advisory, planning, or screening board, reporting directly to the Administrator, should be authorized and given status by statute.

That is indicated as I briefly outlined at the beginning of my remarks on the organization as to where it would be located in the organization plan of the Agency.

Section 208 (e) of the act may provide this authority but is not clear in this respect.

This group could serve as a sounding or advisory board to study, review, and make recommendations on proposals, plans, programs, etc.

As I said before, it might be generated either within or outside the Agency.

With respect to transfer to the Department of Defense – and before I enter into that part of my statement. I would like to explain, Mr. Chairman, that I have got considerable personal experience with this matter of

transfer of civilian employees to the Department of Defense and the functions of the Department of Defense with relation to civil aviation.

For 6 years prior to World War II. I was the Director of airports in the Civil Aeronautics Administration, and 17 years ago almost this day, became a Reserve officer, was recalled to active duty in the Headquarters of the Army Air Forces about 5 months before Pearl Harbor, and became Chief of the Civil Aeronautics Section of the Headquarters of the then Army Air Forces, and as a dual position I was Army representative and Chairman of the Interdepartmental Air Traffic Control Board, which was the grandfather of the present Air Coordinating Committee.

It was a board which consisted of membership of the Army, the Navy, the CAB, and the CAA, and we were responsible for the allocation of all airspace for not only aviation purposes but for gunnery ranges and any activity on the ground that entered the airspace, the allocation of airports, both civil and military for Army, Navy, and Air Force use at the beginning of World War II.

So I have some very strong feeling based on personal experience as to just how this civil agency should function in time of war, and I concur with the views of the association which strongly opposes the adoption of section 208 (b) which proposes transfer of the Federal Aviation Agency, intact, to the Department of Defense in the event of war.

Based on past experience, civil aviation would certainly suffer severely and, we believe, unnecessarily, under such an arrangement.

The primary function of our Military Establishment is defense of the United States and its possessions, and the successful prosecution of any war in which we may become engaged – this is a full-time job, and the Department of Defense should not be saddled with such activities as the examination of student pilots, the certification of civil aircraft and airmen, and the enforcement of civil-air regulations, in time of war or national emergency.

CONSOLIDATION OF CIVIL-MILITARY AIR TRAFFIC CONTROL, AGENCIES

Three weeks ago, in testifying before the Senate Interstate and Foreign Commerce Aviation Subcommittee on S. 3880, companion bill to H. R. 12616, I stated that NASAO recommended the consolidation of the offices, and the 17,500 civil and approximately 18,400 military personnel responsible for the installation, maintenance, and operation of air traffic control and air navigation, as expeditiously as circumstances will permit – not waiting until after we become engaged in a war or a major national emergency.

More recently, the Honorable Malcolm MacIntyre, Under Secretary of the Air Force, testifying for the Department of Defense on both S. 3880 and H. R. 12616, recommended a similar course of action. He pointed out that, if the CAA air traffic control and air navigation facilities personnel were organized as a special career service, such as the United States Public Health Service or the Coast Guard, when they are transferred to the new Federal Aviation Agency, they could be easily and rapidly transferred to the Department of Defense during a war,

and that an organization of this type would allow the military services to reduce their personnel engaged in air-traffic control to the minimum required for Air Force, Army, and Navy aviation in forward combat zones and on aircraft carriers.

Mr. MacIntyre outlined in detail the many personnel and operating advantages, financial savings, and safety features that would be accomplished by the establishment of a consolidated, semi-independent division for air-traffic control and operation of air navigation aids, which I will not repeat here as they are already a matter of record, but NASAO, generally, concurs with his views.

COOPERATION WITH STATE AND LOCAL GOVERNMENT AGENCIES

We feel that section 4, section 15 (2), and section 15 (14) of H. R. 12616 deserve close scrutiny. These sections, taken together, appear to authorize and direct the new Administrator to control and regulate the use of the airspace from the surface to infinity, regardless of the purpose for which it is used. This we feel to be –

(*a*) unnecessary became it would go far beyond the lower limits of airspace normally required for the safe operation of aircraft, and the normal use of airspace by property owners;

(*b*) unwise because it could rule out in the future many of the valuable contributions made by the States and their communities in such activities as airport development and local enforcement of safety regulations; and

(*c*) might be considered both as a taking of private property without compensation and a direct invasion of States rights.

It would be most unfortunate if a bill as important as this one were enacted and then emasculated by the courts.

The following paragraphs from a recent issue of the American Aviation Daily illustrate the type of court action to which I refer.

The government is preparing for a substantial increase in the number of damage claims filed by homeowners and others who say the "murderous shriek" of jet aircraft is more than they can abide. A recent ruling by the United States Court of Claims – In the first case involving jets awarded $65,000 plus interest to a Savannah, Ga., home-building firm because of loss of sales resulting from low-flying jets.

The Government attempted to prove that, since heavy piston-engine bombers previously used the same field in large numbers, the noise problem existed before the introduction of jets in 1953.

The court ruled otherwise, holding that, by the frequent and low flights of military jet aircraft, the Government had, in effect, taken an aerial easement without just compensation to the owners – an act which is forbidden by the fifth amendment to the Constitution.

There are 17 more such cases pending in the United States Court of Claims. All are damage suits involving $10,000 or more. Some 38 other suits for smaller amounts, are also pending against the Government in the various Federal district courts. These were filed on the basis of the 1946 Supreme Court decision that the Government is liable for the consequences of frequent low-level flights by military planes over private land.

We believe this possibility of emasculation by the courts can be avoided if the Administrator were limited

to making reasonable rules, and if the word "navigable" were coupled with the word "airspace," where used in the above sections.

It is suggested that the present definition of "navigable airspace" could be improved by rewording it to read:

"Navigable airspace" means airspace over the minimum altitudes of flight prescribed by regulations issued under this Act, found to be necessary for the safe and efficient movement of air commerce.

Even though the next suggestion appears to us to be implicit in our Constitution, it might be well to further qualify the Administrator's authority as follows:

That no rule, regulation, or order, regarding use of the airspace shall be valid to the extent that it constitutes a taking of property rights without compensation, and that nothing in the act shall be deemed to abrogate the right and responsibility of the several States to protect, under their police power, the welfare and safety of their inhabitants.

The Civil Aeronautics Act of 1938, in section 205 (b) authorized the Civil Aeronautics Authority, which included the Board, to cooperate with State aeronautical agencies in various matters of common concern. This, we believe, has been a productive relationship.

We note that H. R. 12616 has limited this congressional mandate to the Civil Aeronautics Board, and has made no provision for such cooperation between the new Federal Aviation Agency and the States. We suspect this to be an oversight, and suggest the following additional section 208 (h) be added to the bill:

The Administrator is empowered and directed to confer with any State or Territorial aeronautical agency in connection with any matter arising under this Act within his jurisdiction, and to avail himself of the cooperation, services, records, and facilities of such agencies, as fully as may be practicable in the administration and enforcement of this Act; and

The Administrator is further empowered and directed to utilize to the maximum extent practicable, State and Territorial –

(a) airport plans and engineering facilities in the preparation of national airport plans, and in the administration of national airport programs:

(b) law enforcement agencies, personnel and facilities, in the administration and enforcement of safety and air traffic regulations; and

Agencies in the registration of aircraft and airmen, and for such other functions as the various States and political subdivisions thereof may demonstrate the ability and willingness to assume.

As an illustration of what I mean I might cite the instance of the experience we have had with the registration of aircraft, for example.

A number of States now require the owners of aircraft to register their aircraft in a manner similar to automobiles. In those States where such legislation has been adopted, we have discovered, when they begin registering at the State level, that the Federal registration records were in error by as much as 400 and 500 airplanes that either did not exist or existed and of which the Federal Government had no record.

We found 1 Airplane in Indiana that had changed hands as many as 7 times, of which the Federal Government had no record, which, we believe, is conclusive evidence that that particular activity could be much more effective and efficiently handled at the State level than it can at the Federal level, and I could cite other instances.

It is difficult to understand how all aircraft, operating from all landing areas, can be subject to complete, exclusive, and full-time Federal control, when federally operated airport traffic control towers are installed and operating at only about 185 of the Nation's approximately 7,000 airports and landing fields.

As vertical-takeoff-and-landing aircraft, helicopters, convertiplanes, and other types of high takeoff and landing performance aircraft come into common use, we may expect to see more and more flying from backyards and the garage roofs of private owners.

It would require a Federal organization of tremendous size to police the landing and takeoff of aircraft every where, and the entire airspace at the lower altitudes, which is now being done largely by State aviation agencies, State and local police, concurrently and in cooperation with Federal aviation agencies.

I want to emphasize the cooperation between the Federal and State agencies. I am not advocating that the States move in and adapt their own safety regulations or air traffic control procedures. Those should be established jointly by the States and the Federal Government and adopted as a national set of rules and regulations, but that the States should assume the major responsibility for their enforcement.

The proposed additional section 208 (h), which would authorize the Administrator to utilize State and local agencies in carrying out his responsibilities under the proposed legislation, is not without precedent. Administration of the Federal highway program by the States is one example, and there is pending in the present Congress a bill, H. R. 11078, to promote boating safety on the navigable waters of the United States and to provide for the registration and numbering of boats by an agency in the State in which the boat is principally used.

The bill directs the Secretary of the Department in which the Coast Guard is operating to establish an overall United States numbering system with a block of numbers assigned to each State.

* * *

As I understand it, the way the bill is drawn today the new Federal Aviation Agency will be under the executive branch and accountable to the President.

Do you think that this would be better than if it were accountable to Congress?

Mr. McMULLEN. I would prefer to see it report to the President at least for a while. I think, as I recommended, it should have Cabinet status. We think that aviation at the rate it is growing and with the outer-space problems that are becoming involved and all, that it is almost time, if not time, that it should be recognized the same as the Department of Defense, the Department of Commerce, or other agencies that now have Cabinet status.

Mr. FRIEDEL. Are all the other agencies accountable to the executive branch?

Mr. McMULLEN. They at least are in, I think, on the most policy-making decisions in which the Cabinet is assembled for advice.

Mr. FRIEDEL. Are you speaking of the Cabinet members?

Mr. McMULLEN. Yes, sir.

Mr. FRIEDEL. Or other agencies?

Mr. McMULLEN. No; I am now speaking of Cabinet members.

Mr. FRIEDEL. I know that the Cabinet members are accountable to the President. I am talking about agencies, the CAA, CAB, SEC. Should this be an independent agency accountable to the President or be accountable to the Congress?

Mr. McMULLEN. Well, as I said before, I think it should be accountable to the President until it is granted Cabinet status. I made that recommendation at the beginning of my statement. I do not believe you had arrived at that time.

Mr. ROBERTS. The gentleman from North Carolina.

Mr. KITCHIN. No questions.

Mr. ROBERTS. Thank you very much, Mr. McMullen. Our next witness will be Mr. A. L. Wheeler, vice president and director of North Central Airlines, Inc., Minneapolis, Minn.

You may proceed, Mr. Wheeler.

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CONFERENCE REPORT

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 3880) entitled "An act to create a Civil Aeronautics Board and a Federal Aviation Agency to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft," submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The House amendments struck out all of the Senate bill after the enacting clause and inserted a substitute text

and provided a new title for the Senate bill, and the Senate disagreed to the House amendments.

In large part the provisions of the Senate bill and the House substitute amendment were the same or similar, but there were some rather importance differences.

The committee of conference recommends that the Senate recede from its disagreement to the amendment of the House to the text of the bill, with an amendment which is a substitute for both the text of the Senate bill and the House amendment to the text of the Senate bill, and also recede from its disagreement to the amendment to the title.

The differences between the House amendment to the text of the bill and the substitute agreed to in conference are noted below, except for clerical corrections, incidental changes made necessary by reason of agreements reached by the conferees, and minor drafting and clarifying changes.

Table of contents. – The Senate bill contained a table of contents, immediately preceding title I, showing the division of the bill into titles and sections. The House amendment omitted the table of contents. A table of contents is included in the bill agreed to in conference.

Parachute jumpers. – Section 101(7) of the House amendment, unlike the Senate bill, included within the definition of the term "airman" any individual who makes test, exhibition, or practice parachute jumps from aircraft, whether for sport or for monetary consideration. The bill as agreed to in conference omits the House provisions as to parachute jumpers.

Administrator and Deputy Administrator. – One major point of difference between the Senate bill and the House amendment concerned the matter of military status or background of the Deputy Administrator in any case where the Administrator is a former Regular officer of one of the armed services.

Both the Senate bill and the House amendment provided with respect to the Administrator (as does the bill agreed to in conference, in sec. 301 (b)), that "at the time of his nomination he shall be a civilian * * * ."

With respect to the Deputy Administrator, section 302(b) of the bill as passed by the Senate provided that nothing in the act or other law should preclude appointment to the position of Deputy Administrator of an officer on active duty with the armed services. The House retained this provision, but added an exception, as follows:

> except that if the Administrator is a former regular officer of any one of the armed services, the Deputy Administrator shall not be an officer on active duty with one of the armed services or a retired or resigned regular officer of one of the armed services.

This exception is retained in the bill agreed to in conference with a slight clarifying change, so that it reads as follows:

> except that if the Administrator is a former regular officer of any one of the armed services, the Deputy Administrator shall not be an officer on active duty with one of the armed services or a retired regular officer or a former regular officer of one of the armed services.

The requirement in section 301(b) that the Administrator be a civilian at the time of his nomination means that he shall be a civilian in the strictest sense of the word. Thus, at the time he is nominated he may not be on the active or retired list of any regular component of the armed services or be on extended active duty in or with the armed services.

The exception in section 302(b) recognizes that the Administrator may be a former Regular officer of one of the armed services whose official connection with his former military service had been completely severed at the time he was nominated for the office of Administrator. However, it provides that in that event the Deputy Administrator must be a person without any prior service as a Regular military officer.

Personnel provisions. – Section 202(b) of the Senate bill contained provisions, not contained in the House amendment, authorizing the Civil Aeronautics Board to place not to exceed 15 positions in grades 16, 17, and 18 of the General Schedule of the Classification Act of 1949, as amended, subject to the standards and procedures prescribed by section 505 of that act. These 15 positions were to be in addition to the total number of positions authorized to be placed in such grades by section 505 of the Classification Act of 1949. Section 202(b) of the bill as agreed to in conference is similar to section 202(b) of the Senate bill, except that the number of such supergrade positions is reduced from 15 to 8. The bill as agreed to in conference also makes it clear that these eight supergrade positions for the Board are in addition to the number of positions allocated to the Board from the total number authorized by section 505 of the Classification Act of

1949, as amended, and also are in addition to the number of such positions authorized for the Board by Public Law 85-469. Section 202(b) of the conference agreement also provides that there shall be no reduction in total number of supergrade positions under section 505(h) of the Classification Act of 1949, as amended, by reason of the supergrade positions authorized for the Civil Aeronautics Board by Public Law 85-469.

Section 302(f) of the Senate bill, granting general authority to the Administrator to appoint personnel in accordance with the civil-service and classification laws, contained language authorizing the Administrator to fix the compensation of not more than 10 positions at rates not to exceed $19,500 per annum. In the corresponding subsection of the House amendment this language was omitted. In the bill as agreed to in conference the language is restored.

Section 302(j) of the Senate bill contained provisions, not contained in the House amendment, authorizing the Administrator to place not more than 100 positions in grades 16, 17, and 18 of the General Schedule of the Classification Act of 1949, as amended subject to the standards and procedures prescribed by section 505 of that act. These positions were to be in addition to the total number of positions authorized to be placed in such grades by such section 505. Section 302(j) of the bill as agreed to in conference is similar to section 302(j) of the Senate bill, except that the number of such supergrade positions is reduced from 100 to 50. The bill as agreed to in conference also makes it clear that these 50 supergrade positions are in addition to those positions transferred to the new Federal Aviation Agency under section 1502 of

the conference agreement which were, before the effective date of section 302(j) of the conference agreement, (1) allocated to the Civil Aeronautics Administration under section 505 of the Classification Act of 1949, as amended; (2) authorized for the Civil Aeronautics Administration by Public Law 85-469; or (3) authorized for the Airways Modernization Board by Public Law 85-133. Section 302(j) of the conference agreement also provides that there shall be no reduction in total number of supergrade positions under section 505(h) of the Classification Act of 1949, as amended, by reason of the supergrade positions authorized for the Civil Aeronautics Administration by Public Law 85-469.

Airmail pay. – Section 406 of the bill agreed to in conference deals with the Civil Aeronautics Board's function of determining the fair and reasonable rates of compensation for transportation of mail by aircraft, the factors or elements to be considered in fixing such rates, the payment of such rates, and related matters. It is a reenactment, with certain modifications, of section 406 of the Civil Aeronautics Act of 1938.

Reorganization Plan No. 10 of 1953, which became effective on October 1, 1953, modified the operation of section 406 of present law so as to provide, in effect, that so much of the total airmail rate payable to an air carrier under such section as was determined to be payable without regard to the "need" clause of subsection (b) thereof should be paid by the Postmaster General and that the remainder should be paid by the Civil Aeronautics Board.

Although Reorganization Plan No. 10 thus modified the operation of the law, no actual change was then made, nor has any since been made, in the text of section 406 to reflect the modifications made by the plan.

Is this legislation the Senate, in proposing to reenact section 406 of the present law, made modifications which would have excluded any element of subsidy from air mail rates and would have added a new provision providing for the determination of subsidy payments. Payments would have been made, however, in the manner provided for in Reorganization Plan No. 10. The House committee was not certain that the changes made by the Senate would not make some unintended change in the law as it operates today. It therefore modified the Senate bill so as to retain the text of section 406 as it is in present law, but added a subsection providing, first, that nothing in the section should be held to repeal or modify the Reorganization Plan No. 10 of 1953 and, second, that such plan should apply in the case of section 406 of this proposed legislation as it has been applicable with respect to the operation of section 406 of the Civil Aeronautics Act of 1938, as amended.

The committee of conference feels that it is desirable at this time to restate in statutory form the law as it actually operates at present and to repeal the provisions of Reorganization Plan No. 10, particularly since one of the objectives of this legislation is to eliminate obsolete and technically inaccurate provisions.

Further study has been given to this matter since the bill passed the House. It has been possible for the committee of conference to work out compromise language

which clearly does no more and no less than bring section 406 into conformity with the Reorganization Plan No. 10. With these changes it is possible to repeal Reorganization Plan No. 10 of 1953, and this is done in section 1401(a) of the bill agreed to in conference.

The total compensation to be fixed by the Board for the transportation of mail by aircraft is to be determined precisely as it is under the present law, and the determination of that part to be paid by the Postmaster General and that part to be paid by the Board will be made on the same basis as at present.

Appeals under section 609. – Section 609 of the bill as passed by the Senate and the House amendment, although not identical, both provided a procedure for the amendment, suspension, and revocation by the Administrator of certain types of certificates. These provisions authorized any person affected by the Administrator's action to appeal to the Civil Aeronautics Board.

The bill agreed to in conference follows closely the provisions of the House amendment, but a sentence has been added to provide that in the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The addition of this provision probably makes no actual substantive change, but it has been inserted to conform with language appearing in the procedural provisions contained in section 602, with respect to review by the Board of action of the Administrator in denying applications for issuance or renewal of airman certificate.

One respect in which the Senate bill and House amendment differed, in the case of section 609, was that

language was added in the House amendment to provide that when the Board had entered an order in a case appealed to it the Administrator could, as to matters of law, obtain judicial review of the order of the Board under the provisions of section 1006. This provision is omitted from the bill agreed to in conference.

Declaration of policy applicable to Board. – Section 2 of the Civil Aeronautics Act of 1938, as amended, now contains a single declaration of policy. In lieu of this single declaration, this proposed legislation (in secs. 102 and 103 contains two declarations of policy: One applicable to the Civil Aeronautics Board and the other applicable to the Administrator of the Federal Aviation Agency.

Section 2 of the present law, in paragraph (f), states in effect .nat one of the objectives of the Act shall be "the encouragement and development of civil aeronautics." This clause has been carried over into both of the declarations of policy in the bill agreed to in conference, but the word "promotion," has been inserted before the word "encouragement."

Some fear has been expressed, in the case of the declaration of policy applicable to the Board, that the addition of this word may be regarded as evidencing an intent that Congress wishes the Board to change in some way the economic regulatory policies or interpretations developed during the past 20 years under the existing law. The addition of this word is not intended to have any such effect.

Effect of reenactment of provisions of present law. – The committee of conference wishes to make it clear that it endorses, as expressing the intention of the managers

on the part of the Senate and the managers on the part of the House, the statements in the House debate, and the House committee report to the effect that the Congress does not intend that this reenactment of portions of the Civil Aeronautics Act of 1938 shall constitute legislative adoption of administrative interpretations and practices or of judicial decisions under that act. It is important that there be no doubt on this point, particularly in view of the many legal controversies over the interpretation of the provisions of title IV. The reason for reenactment of the statute, instead of using section-by-section amendments, as the legislative method of creating the Federal Aviation Agency (the main purpose of this legislation), was primarily the difficulty posed by the many amendments which the latter method would have necessitated and the risk of error inherent in that process.

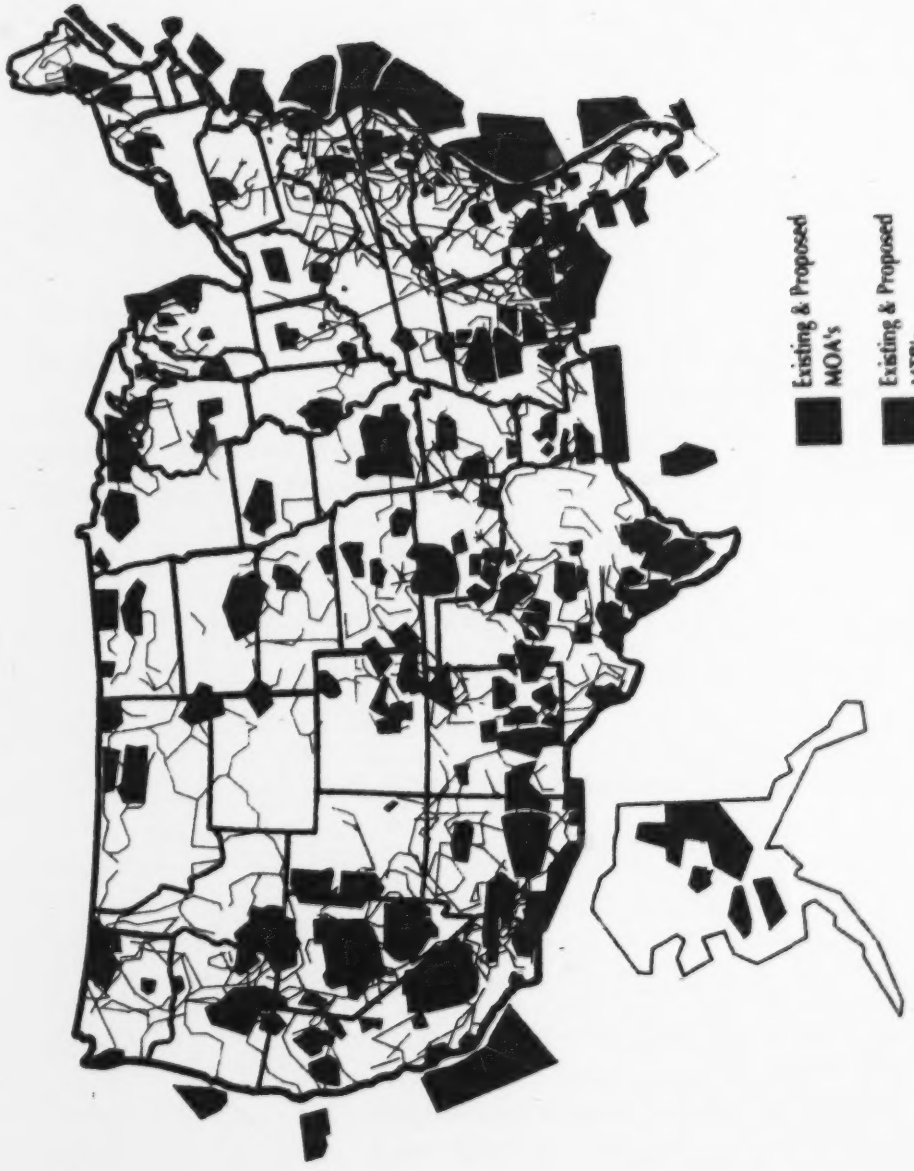
As stated in the report of the House committee on this legislation, therefore, the reenactment of provisions now in effect is to be regarded as a completely neutral factor in any question arising hereafter as to the interpretation of the present law or of this new legislation.

Effective date. – Section 1415 of the Senate bill provided that all of title III and section 1415 should take effect on the date of their enactment and that the remaining provisions should take effect on the 90th day following the date of enactment of the bill, except that the Administrator was empowered to postpone the effective date of any provision of the bill (other than any provision which would take effect on the date of its enactment) to such time as he might designate, but not beyond the 180th day following such date of enactment.

In lieu of the Senate provision, section 1505 of the House amendment provided that certain named sections of title III and section 1505 should take effect on the date of their enactment and that the remaining provisions should take effect on the date of their enactment and that the remaining provisions should take effect on the 30th day following the date on which the Administrator of the Federal Aviation Agency first appointed under the legislation qualifies and takes office.

The effective date provision in the bill agreed to in conference (section 1505) is identical to section 1505 of the House amendment, except that the 30-day provision is extended to 60 days.

OREN HARRIS,
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CHAS. A. WOLVERTON,
JOS. P. O'HARA,
PAUL F. SCHENCK,
Managers on the Part of the House.


Existing & Proposed
MOA's
Existing & Proposed
MTR's

(LOGO)

THE RURAL ALLIANCE
502 East John Street, Suite D
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AIR NATIONAL GUARD
LONG RANGE AIRSPACE PLANNING

January 1992

Abstract

Building upon "Air National Guard Long Range Airspace Planning," March 8, 1991, this document presents a summary of airspace planning activity between March and December 1991. It includes:

- ***Description of the Planning Process;***
- ***Regional Airspace Plans;***
- ***Status of Airspace Planning in those Regions that have yet to Develop a Plan;***
- ***Regional and ANG-wide Airspace Issues to be Worked.***

EXECUTIVE SUMMARY

I. THE PLANNING PROCESS

Situation

Airspace has become a precious national resource which must be shared by numerous users with diverse needs. There is competition between the military, the airlines, and private aviation for the limited quantity of airspace available. Environmental groups have become

very well organized and some automatically oppose the continued use, establishment, or modification of military training airspace. For the foreseeable future, the Air National Guard will require access to suitable airspace in which its aircrews can train realistically to meet mission requirements. In order to do this, the Air National Guard must effectively plan for and manage its airspace or lose control over access to it.

There is considerable Congressional pressure on the Federal Aviation Administration (FAA) and the Department of Defense to better manage the airspace used by the military (GAO Report to the Honorable Jesse A. Helms, US Senate, *Airspace Use – FAA Needs to Improve Its Management of Special Use Airspace*, August 1988). Environmental factors, increasing air traffic, and force modernization are making the process of managing airspace more complex.

The availability of training airspace and ranges was and is a significant factor in DOD and Air Force assessments of bases and installations for weapons systems beddowns and closures. Numerous other factors influence such decisions and the process is not perfect. The decision to beddown a particular weapon system

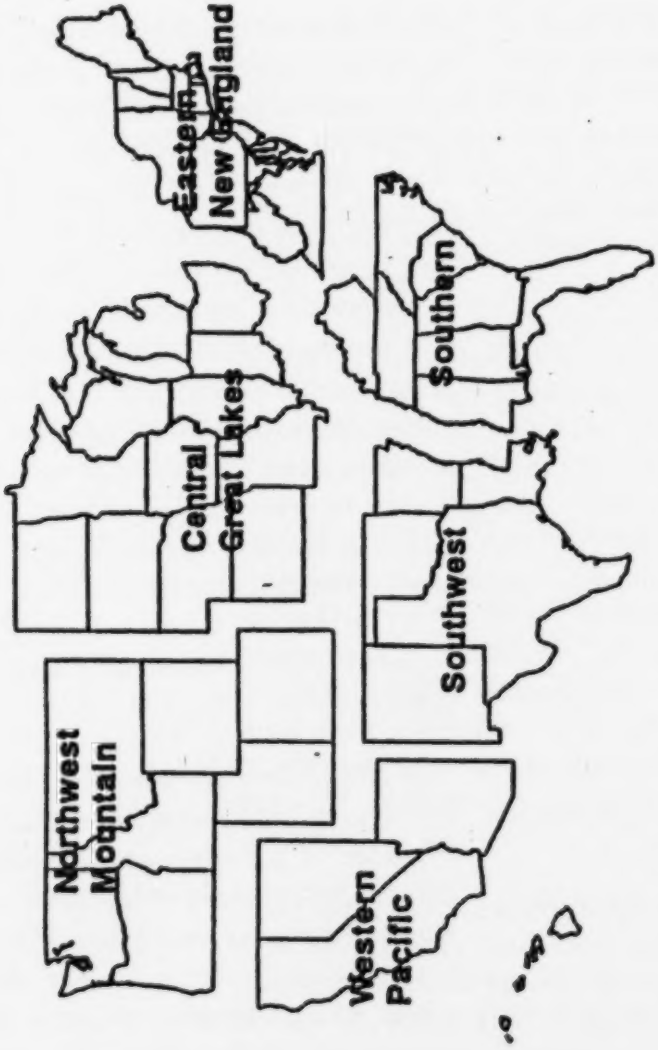
at an installation may require the acquisition or modification of airspace to permit quality training without excessive deployments.

The ANG airspace planning process entails identification, validation, and prioritization of regional airspace needs; definition and selection of preferred solutions; and development of a coordinated implementation plan. The process continues to mature, incorporating the tenets of Total Quality Management and relying on the involvement of senior ANG leaders from each state. Other agencies are becoming an integral part of the process, including the Federal Aviation Administration (FAA), Air Staff, MAJCOMs, Air Force Reserve, Army National Guard, and Army.

Regional Airspace Planning Committees

The ANG airspace planning focus is on *regional* and *interstate* – vice state or unit – airspace requirements, alternatives, and preferred solutions. Regional Airspace Planning Committee principals are senior ANG leaders from each state in the respective FAA region. The principals also serve as the ANG single point of contact in their state for airspace matters.

Figure E5-1. Federal Aviation Administration Regions



The committees address and integrate the following elements: unit equipage plans; operational training needs; existing airspace and ranges throughout the region and surrounding states; potential for new or modified airspace/ranges; training concepts; airspace management tools (scheduling, deconflicting, and reporting); and political, public affairs, and environmental issues. Matters related to ANG air-to-surface ranges are worked in coordination with the Director of Operations, Air National Guard Readiness Center (ANGRC/DO) and the ANG Range council. An area of special interest is Joint Planning, stressing coordination of airspace planning efforts with other military agencies.

ANG Airspace Steering Committee

The ANG is considering establishment of a national-level Airspace Steering Committee to provide policy guidance and coordinate the efforts of the Regional Airspace Planning Committees.

To help formulate ANG positions and policies on airspace matters, the Steering Committee would review national-level airspace issues that the regional committees have proposed for study, and select and refine those to be worked in the current planning year. The Committee would establish and

support *ad hoc* groups to study the selected issues; review issue studies; and present the recommended ANG position or actions to ANG leadership. Issue study results would be published as part of the next update of the Airspace Plan.

Regional Planning Activity

Each Regional Airspace Planning Committee holds meetings to determine training airspace requirements and shortfalls and to develop a *regional* approach to satisfy the shortfalls. The planning timeframe is five to ten years in the future.

When appropriate, a Regional Airspace Planning Committee presents its projected airspace requirements, alternative solutions, and rank-ordered list of preferred solutions to the ANG Readiness Center. *This should be the only vehicle by which an airspace proposal is validated and funded.*

The Regional Committee then, with NGB help, develops a coordinated action plan which includes Operations and Resources Studies (OARS), the Environmental Impact Analysis Process (EIAP), and coordination with state and federal agencies. Early involvement with the FAA (specially the Air Route Traffic Control Centers (ARTCCs)), the Air Force Representatives to the

FAA (AFReps), and MAJCOM airspace managers is essential. ANG Public Affairs at the NGB, state, and unit levels must play an integral role throughout this process.

II. REGIONAL PLANS AND REPORTS

Eastern-New England Airspace Plan

Airspace. Since its establishment in March 1990, the Eastern-New England Airspace Planning Committee has met several times. Working Groups have been established to study various aspects of training airspace.

The committee has been working since April 1991 with NGB on a regional Environmental Impact Statement (EIS) process. Driven by the pending conversion from A-10s to F-16s by the 103 TFG, Bradley ANG Base, CT, and the 104 TFG, Barnes Municipal Airport, MA, as well as by training airspace shortfalls identified by the Airspace Planning Committee, the EIS is addressing the impacts of the conversions on the airport areas and on existing, modified, and proposed new airspace in the region.

The Airspace Planning Committee, working closely with unit airspace and operations managers and the ANG Airspace Management Branch, developed six airspace proposals to be considered in the EIS, as reflected in Table ES-1.

Table ES-1. Eastern-New England Region Airspace Proposals

AIRSPACE PROPOSAL	LOCATION	ALTITUDES	STATUS
New Great State of Maine MOA	Northwest Maine	100' AGL to 5,500' MSL	EIS in progress
Lower Floor of Condor 1 MOA	Southwest Maine	300' AGL to 18,000' MSL	EIS in progress
Syracuse 5 & 6 MOAs	Central New York	(5) 2000' AGL to 6,000' MSL (6) 2,000' AGL to 10,000' MSL	EIS in progress
New Antler MOA	Central Pennsylvania	300' AGL to 5,000 MSL	EIS in progress
Expand Yankee Two MOA	New Hampshire	100' AGL to 9,000' MSL	EIS in progress
Add Segments to VR-1709	Delaware & New Jersey	Varied	EIS in progress

As of December 1991

Progressing on a parallel track with the EIS is the formal airspace proposal process. Coordination with the FAA was established early in the process and has continued throughout.

This effort is one of the first to exercise the FAA's role as a Cooperating Agency in the environmental impact analysis process, as directed by Council on Environmental Quality regulations and DOD/FAA Memorandum of Agreement.

The ANG completed, in the summer of 1991, a baseline environmental review of the military training routs (MTRs) that ANG units manage in Delaware, Maryland, New Jersey, North Carolina, and Virginia.

Regional Issues. Issues being addressed by the Eastern-New England Airspace Planning Committee, or that have been raised by ANG units in the region, include:

- The need for overland airspace for LOWAT and intercept training;
- In light of the conversion of the 108 TFW, McGuire AFB, NJ and the 112 TFG, Pittsburgh, PA to KC-135s, how should the ranges those units have operated be managed and resourced?

- Access to airspace for high altitude intercept training.
- Access to more low altitude training airspace to preclude over-use of any single area and attendant excessive environmental impact.

Central-Great Lakes Airspace Plan

Airspace. Established in June 1990, the Central-Great Lakes Airspace Planning Committee focus is on regional needs and solutions. Action items are being worked by several Action Groups for specific issue development and recommendations. The committee has validated the airspace initiatives shown in Table ES-2.

Airspace actions that have been recently completed or are presently being worked are in Table ES-3.

Table ES-2. Central-Great Lakes Region Airspace Proposals

AIRSPACE PROPOSAL	LOCATION	ALTITUDES	STATUS
Move and Expand Fechter MOA	Northwest Iowa	5,000' MSL to 18,000' MSL	Draft OARS
New Lindbergh MOA	Southern Missouri	5,000' MSL and Higher	Draft OARS
Enlarge Lake Andes MOA	South Dakota	6,000 MSL to 18,000 MSL	Draft OARS
New Air-to-Ground Range	South Dakota	Surface to TBD	Draft OARS

As of December 1991

Table ES-3. Central-Great Lakes Region Airspace Actions

AIRSPACE ACTION	LOCATION	ALTITUDES	STATUS
New Pruitt MOA	Illinois	500' AGL to 6,000' MSL	Charted
Move and Expand Snoopy MOA	Minnesota	6,000' MSL to 18,000' MSL (300' AGL over water)	Charted
Modify Volk and Falls MOAs	Wisconsin	Varied Low to Medium	To be Charted in Early 92
Enlarge Twelve Mile MOA and Widen Low Level Routes	Indiana	500' AGL to 6,000' MSL	Environmental Assessment Completed
New MTRs into Volk/ Hardwood Range	Illinois, Iowa, Wisconsin	100' AGL 5,000' MSL	Environmental Assessment Began Oct 91
Expand & Lower Beaver MOA	Minnesota	300' AGL to 18,000' MSL	Environmental Assessment Began Oct 91
New Thumb MOA	Michigan	500' AGL 4,000' AGL	Formal Proposal Submitted

As of December 1991

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Regional Issues.

- How can flying units in the Central-Great Lakes region best use the Wisconsin ACMI range complex? [The Wisconsin ANG has developed a long range plan for the range complex that addresses expansion of the air-to-surface range, targets, communications upgrades, weapons scoring systems, expansion of ACMI to airspace over Lake Michigan, enhanced use of the McCoy Range, and integration of the McCoy Range with ACMI.]

- How should Cannon Air-to Ground Range be managed and resourced in light of the conversion of the 131 TFW, St. Louis, MO from F-4s to F-15s?

- Continued use of the airspace associated with R-5503 in Ohio;

- Availability of military radar units to provide aircrew and weapons controller training;

- Maneuvering airspace around Atterbury, Jefferson, and Grayling ranges;

- Ownership and continued operation of the air-to-ground range at Jefferson Proving Ground in Indiana (on the Base Closure List).

Northwest Mountain Airspace Report

Airspace. The Northwest Mountain Airspace Planning Committee was established in August 1991 and had its first regional meeting in October 1991. ANG airspace initiatives that are being worked in the Northwest Mountain FAA Region are shown in Table ES-4.

Table ES-4. Northwest Mountain Region Airspace Actions

AIRSPACE ACTION	LOCATION	ALTITUDES	STATUS
Redeye Complex of Permanent & Temporary MOAs	Colorado	Varied Low to High	Environmental Assessment in Progress
Establish Juniper Low MOA	Oregon	300' AGL to 11,000' MSL	Environmental Assessment in Progress

As of December 1991

Regional Issues.

- Overland low altitude airspace for the interceptor units in Oregon;
- Availability of military radar units for aircrew and weapons controller training;
- The "Air Force in Idaho" initiative for beddown of the Mountain Home AFB Composite Wing.

Western Pacific Airspace Report

Airspace. The ANG Airspace Planning Committee for the Western Pacific FAA Region is to be established in early 1992. The ANG is currently pursuing two airspace actions in the Western Pacific FAA Region, as shown in Table ES-5.

Table ES-5. Western Pacific Region Airspace Actions

AIRSPACE ACTION	LOCATION	ALTITUDES	STATUS
New Low Altitude VFR Refueling Tracks	California	Varied 500' to 4,000' AGL	Environmental Assessment Began June 91
Modification of Williams MOAs (Outlaw and Jackal MOAs)	Arizona	5,000' AGL to 18,000' MSL	OARS Submitted

As of December 1991

Regional Issues.

- Availability of ACMI debriefing systems and ACMI pods for fighter units in the region;
- Reactivation of the Paso Robles-Santa Barbara high altitude Intercept Training Area.

Southwest Airspace Report

Airspace. The ANG Airspace Planning Committee for the Southwest FAA Region is to be established in early 1992. The ANG is supporting three airspace initiatives in the Southwest FAA Region, as listed in Table ES-6.

Table ES-6. Southwest Region Airspace Actions

AIRSPACE ACTION	LOCATION	ALTITUDES	STATUS
New Rocket MOA	New Mexico	13,500' MSL to 18,000' MSL	Environmental Assessment Completed
New Chase 3 Low MOA	South Texas	300, AGL to 8,000' MSL	Environmental Assessment Began Nov 91
New Low Level Routes into Razorback Range	Arkansas	100' AGL to 4,000' MSL	Environmental Assessment Began Nov 91

As of December 1991

Regional Issues. The above initiatives address some of the shortfalls identified by ANG units in the Southwest FAA Region and included in *Air National Guard Long Range Airspace Planning*. March 8, 1991.

Southern Airspace Report

Airspace. ANG flying units in the Southern FAA Region, joined by some units from the Southwest FAA Region, met at Gulfport Combat Readiness Training Center (CRTC) on August 2-3, 1990. That unit-level meeting updated participants on the ANG Long Range Airspace Planning Process, established lines of communication, and provided a forum to discuss operations concepts for the Gulfport ACMI. It also served to start unit personnel thinking about regional needs and solutions. The meeting was an important interim step in the overall process, since an Airspace Planning Committee for the Southern FAA Region will probably not be established until early 1992.

The ANG is presently working one airspace initiative in the Southern FAA Region, as shown in Table ES-7.

Table ES-7. Southern Region Airspace Actions

AIRSPACE ACTION	LOCATION	ALTITUDES	STATUS
DeSoto 2 MOA	Mississippi	100' AGL to 5,000' MSL	Formal Proposal Submitted

As of December 1991

Regional Issues.

- Scheduling responsibility for the Gulfport ACMI (W-453) and the Eagle Golf [sic] Area;
- Availability of ACMI debriefing systems and ACMI pods for fighter units in the region;
- C-130 unit access to drop zones and assault landing strips.

III. AIRSPACE PLANNING ISSUES

Listed below are those airspace issues that are of potential interest throughout the Air National Guard.

Centralized/Automated Airspace Scheduling

To what extent should the ANG get involved in the use, development, and refinement of automated and centralized scheduling and reporting systems for airspace and rangés? Under contract to AF Systems Command. MITRE Corporation is developing the Military Airspace Management System (MAMS). TAC has developed two systems: Aircrews Airspace Schedule System (ACASS) and TAC Airspace Data Collection System (TADCS). SAC uses their Military Airspace Management System (MASMS). Will there be a common system that all users of special use airspace will be required to use?

Training with Long Range Air-to-Air Weapons	What will be the training requirements for weapons such as AMRAAM? Will missile simulators be carried on training missions? Can realistic tactics training be accomplished in existing or programmed airspace? Will ground or airborne radar control systems be needed?
Training with Standoff Air-to-Surface Weapons	What will be the training requirements for weapons such as the AGM-130 or AGM-142 Have Nap? Will missile simulators be carried on training missions? Will actual launches be practical? Can realistic tactics training be accomplished in existing or programmed ranges/airspace?
Night Operations Training	To what extent, how, and where will ANG fighter aircrews train in night low level operations using such systems as LANTIRN? Will more night range operations be required? Will environmental assessments of MTRs, MOAs, and ranges have to be updated?
Control of Training Airspace by Military Radar Units	Would there be an advantage to having military radar units control training airspace used by ANG units? Would such control permit larger airspace areas, with greater vertical limits? Would it provide more availability of airspace by virtue of allowing "real-time scheduling?" What additional controller training and capabilities would be

	required? Could the FAA radar data relay system being tested in Colorado be used for such control? What agreements/procedures would have to be developed between the ANG and FAA?
Effective Operation of Tactical Air Control System (TACS) Units	Are TACS units located so as to provide needed radar surveillance and control to flying units? Do flying units provide sufficient sorties in the airspace that TACS units can "see" to meet controller training requirements? Could the FAA radar data relay system being tested in Colorado be used to extend the effective range of TACS radar coverage to facilitate both flying unit and controller training? Can that same technology be used to provide comprehensive mission briefings and debriefings?
Establishment of Exercise Airspace Complexes (Including change to 7400.2)	Would the establishment of exercise airspace complexes, such as the proposed Redeye Complex in Colorado, be useful in other areas? Where? Can FAAH 7400.2, *Procedures for Handling Airspace Matters*, be changed to permit uncharted temporary MOAs that are environmentally analyzed in accordance with NEPA and can be "activated" with relatively short notice to the FAA?
Training Airspace Parameters	It would be useful to define the optimum airspace dimensions that would support various training

events. Such parameters would provide a common basis for assessing airspace shortfalls and articulating requirements to the FAA and other government agencies. From the Blue Air report:

> An optimum shape for the air-to-air airspace dedicated to current generation fighters is an ellipse. This accommodates the transition of an aerial engagement from a "standoff/acquistion" stage to the unstructured close engagement of a classic "dogfight." For the F-15 and F-16, TAC prescribes dimensions of 40 by 60 NM, and at least 25,000 feet of vertical maneuver airspace, with a floor no lower than 5,000 feet above the ground. This airspace is, fortunately, available at the referenced TAC F-15 bases: however, at many active duty, ANG and AFRES F-16 locations, both vertical and lateral airspace shortfalls are common, and will be a serious future concern.

The ANG has conducted a statistical review of over 300 air-to-air engagements flown on instrumented ranges to determine the lateral and vertical extent of the engagements. Further analysis that considers tactics requirements, set-

	up distances, and buffers from airspace boundaries will lead to development of airspace "models" for different aircraft and training scenarios.
Use of ECM and Chaff in Training Operations	To what extent do ANG training requirements dictate the use of ECM or chaff? What are the environmental ramifications? What are the FAA procedures for approval of chaff dispensing? What success have ANG units had in obtaining clearance for chaff and ECM? Does chaff adversely affect air traffic control radar? Is training chaff available and affordable?
FAA Controller Familiarization	FAA managers have told ANG regional airspace planning committees that only a small percentage of air traffic controllers have had any military service experience. There is a gap in the controllers' knowledge of military flight operations and training. Should the ANG develop a program to educate and familiarize FAA personnel with military flight operations? What agency should develop and administer such a program?
FAA Management Interface	Should each ANG regional airspace planning committee establish a senior-level subcommittee with a charter to conduct regular meetings with senior FAA officials at the region headquarters?

COLORADO AIRSPACE INITIATIVE
WORKING COMMITTEE
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(Please call before faxing.)
May 27, 1994

Lt. Col. Steve Shiell
National Guard Bureau/CE
2500 Army Drive Pentagon
Washington, DC 20310

Dear Lt. Col Shiell,

Since the inception of the proposed Colorado Airspace Initiative (CAI), citizens living within several of the areas that would lie directly under Military Training Routes (MTR) or within the boundaries of Military Operations Areas (MOAs) have documented their opposition to the proposal. In some areas of the state opposition to the Colorado Airspace Initiative has been more pronounced than in other areas. Citizens' concerns primarily have focused toward negative environmental impact on sensitive areas including small communities, state and federal lands, wildlife populations, migratory bird routes, endangered species, the safety of both civilian and military personnel, wilderness areas, and curtailment of rural economic viability and growth.

In order to move beyond a stalemate between the National Guard Bureau's agenda for expanded military airspace as proposed in the Colorado Airspace Initiative and civilian opposition to many facets of the proposal, citizens from throughout the impacted areas agreed to

join together as a Working Committee to reach a consensus that could meet the current training needs of the Colorado Air National Guard (COANG) while protecting the rights and interests of Colorado's civilian populations. This Working Committee has consisted of representatives for Civil Aviation, Citizen Organizations, and Regional Economic Interests. The Colorado Air National Guard appointed three citizens to serve on the Committee. (See Appendix A for listing of organizations and individuals.)

Several federal and state agencies have provided technical assistance and expertise throughout these sessions: Air National Guard Readiness Center, Bureau of Land Management, Colorado Air National Guard, Colorado Department of Natural Resources, Colorado Division of Wildlife, Federal Aviation Administration, Great Sand Dunes National Monument, and US Fish and Wildlife Service. The Working Committee appreciates their contributions.

The concept for the Working Committee surfaced in January 1994. A Steering Committee, composed of COANG personnel and civilian representatives, met in early February to identify the agenda and to establish the format for the sessions. The Working Committee convened for eight full day sessions during a three month period with a target date of June 1, 1994, for submission of a recommendation to be included in the Draft Environmental Impact Statement (EIS). Most meetings utilized the facilities at University of Southern Colorado in Pueblo. Staff members from the offices of Governor Romer, Representative McInnis, and Representative Allard facilitated the Working Committee's deliberations.

The agenda for these deliberations, as presented by the Steering Committee, has been to identify an Alternative to the CAI proposal that accommodates the Colorado Air National Guard's need for airspace that will provide adequate flight training for national defense priorities while seeking a solution that protects the interests and rights of the various civilian populations.

Factors taken into consideration in the formulation of this recommendation include avoidance of specific sensitive areas as identified by civilian populations, elected officials, and state and federal agencies. One major area of concern discussed by the Working Committee is the status of the Airburst Range. Considering that long-term use of the Airburst Range deserves further scrutiny and that the use of the La Veta MOA links directly to the location and use of the Airburst Range, this recommendation, as related to the La Veta MOA, is presented as a temporary solution to Colorado Air National Guard's current airspace needs. If the Airburst Range is discontinued, the La Veta MOA should be deleted.

Another area of concern to the Working Committee is the existing and continuing impact upon Southeastern Colorado residents already subjected to considerable military training activity through the United States Air Force (USAF) Air Combat Command (ACC). The Working Committee urges the Colorado Air National Guard to coordinate with the USAF to minimize the cumulative impact upon this sector of the civilian population and agricultural interests. (See figure 4.)

The Working Committee's recommendation also reflects the concerns expressed by civilians, the governor's office,

and state and federal agencies about the environmental impact upon the mountain areas and adjoining valleys of south central Colorado. The recommendation of the Working Committee for MTRs 412 and 413 takes into consideration the following criteria: the value of nature tourism to the economic stability of southern Colorado's mountain communities, the purposes of wilderness areas as stated in US Forest Service guidelines, the fact that mountain training is not an ANG requirement, solitude as a basic need for spiritual retreat centers, the migratory bird routes that follow along both the eastern and western flanks of the Sangre de Cristo Mountains, the San Luis Valley's arc of wetlands that provide habitat for extensive bird populations including numerous endangered or sensitive species, and maneuvering high speed aircraft to avoid numerous protective airspace bubbles that would be required along MTR 413 south of the Arkansas River.

This recommendation reflects economic considerations based upon data from information and reports from federal, state, and regional agencies, Bill Weida, Colorado College, and others. The recommendation to eliminate Airburst C primarily reflects concerns raised about the use of the Cañon City airport. The safety of civilian pilots as well as the potential loss of business opportunities within the Cañon City area if civilian pilots do not have access to this airport have been cited as reasons for eliminating proposed Airburst C from the Colorado Airspace Initiative. Continuation of Airburst C might increase traffic within the La Veta MOA by a factor of twelve because aircraft could circulate between these two MOAs.

The following recommendation is the result of the Working Committee's attempts to harmonize the Colorado Air National Guard's current airspace training needs and the interests of the impacted civilian populations. The Working Committee, in a spirit of cooperation and mutual respect, unanimously agreed with all but one facet of this recommendation. The only point of this recommendation failing to receive unanimous consensus was the elimination of Airburst C. Three members of the Working Committee believe Airburst C is essential to COANG's training agenda.

The enclosed recommendation is being submitted for further study and analysis within the EIS process and may be subject to review or change after the release of the Draft EIS. The Working Committee requests that you give your attention to the enclosed recommendation for consideration and review as an Alternative to the Colorado Airspace initiative.

Respectfully submitted,

COLORADO AIRSPACE INITIATIVE WORKING COMMITTEE

(See Appendix A for listing of members.)

COLORADO AIRSPACE INITIATIVE
WORKING COMMITTEE
May 27, 1994
RECOMMENDATION

I. LONG RANGE: Rapid development along Colorado's Front Range, together with wilderness preservation efforts in this same area are rapidly rendering the

Airburst Range an unsuitable location for the conduct of aerial bombardment activities. The Working Committee recommends that highest priority should be given to identifying and acquiring a new site for a bombing range to replace the Airburst Range by the earliest possible date.

In that light, the Working Committee recommends that the Colorado Airspace Initiative be considered a temporary, stopgap solution to be implemented only over the short term to accommodate Colorado Air National Guard training requirements until a suitable alternative to the Airburst Range is available. The Working Committee recommends that a similar civilian Committee be established to identify this alternative as soon as possible.

II. SHORT-RANGE: In order to accommodate the Guard's training needs over the short term until a suitable replacement for the Airburst Range becomes available, the Working Committee recommends the following actions on the Colorado Airspace Initiative.

A. Military Training Routes:

1. IR-409.

Route: As proposed in the Final Description of Proposed Action and Alternatives (DOPAA), except follow present alignment from Point F (in Piñon Canyon MOA) to current Point G (at Cedarwood), thence via existing routing to the Airburst Range. (See Figures 1, 2 & 3)
Width: As proposed in the DOPAA, except from Current Point G (Cedarwood) to the Airburst Range, along which segments the width should remain at the existing 3.0 NM either side of center line.

Altitude: As proposed in the DOPAA, except from Point C to Point D to be charted and flown no lower than 1,000 feet AGL during growing season for avoidance of crop spraying aircraft and no lower than 500 feet AGL from Point D to the Airburst Range.
Sortie Count: Sorties should be reduced to 14 per year to accommodate the needs of the Colorado Air National Guard as set forth in the DOPAA.

2. VR-412

Delete VR-412 as proposed in the DOPAA.

3. VR-413.

Route: Configure the route to provide entrance into the Airburst Range from the West without crossing the Arkansas River (as depicted in Figure 1). If a western approach to the Airburst Range from VR-413 is not feasible, VR-413 should be deleted in its entirety and the sorties proposed for VR-413 assigned to VR-416.
Width: 3 NM either side of center line.
Altitude: 500 feet AGL to 1,500 feet AGL.

4. IR-415.

Route: As proposed in the DOPAA to Point D, thence via existing routing to Cedarwood and to coincide with current IR-409 from Cedarwood to the Airburst Range.
Width: As proposed in the DOPAA from Point A to Point D, then 3 NM either side of center line to the Airburst Range.
Altitudes: Minimum altitude over the Arkansas River should be 2,500 feet AGL. No portion of IR-415 should be charted or flown lower than 500 feet AGL.

5. XIR-424.

Route: As proposed in the DOPAA from Point A to Point D, thence direct to Cedarwood to coincide with current IR-409 from Cedarwood to the Airburst Range.
Width: As proposed in the DOPAA from Point A to Point D. Thereafter 3 NM either side of center line to the Airburst Range.
Altitudes: No portion of XIR-424 should be charted or flown lower than 500 feet AGL. An area 5 NM either side of the Arkansas River should be charted and flown no lower than 2,500 feet AGL.

6. XVR-1427

Route: As proposed in the DOPAA from Point A to Point F, thence direct to Cedarwood to coincide with current IR-409 from Cedarwood to the Airburst Range.
Width: As proposed in the DOPAA from Point A to Point F, then 3 NM either side of center line from Point F to the Airburst Range.
Altitudes: As proposed in the DOPAA, except to be charted and flown no lower than 500 feet AGL over the entire route with no flights below 1,000 feet AGL between Points C and D during growing season, for avoidance of crop spraying aircraft.

B. Military Operations Areas:

1. Cheyenne MOA.

As proposed in the DOPAA.

2. La Veta MOA. (See Figure 2.)

Lateral Boundaries: As proposed in the DOPAA, except that the northeast boundary should be extended northeastward to coincide with the

northeast boundary of existing IR-409. The current La Veta low MOA should be re configured to coincide with the boundaries of existing IR-409 from Cedarwood to the northern boundary of the La Veta MOA. The town of Wetmore and vicinity, as a sensitive area, should be excluded from the La Veta MOA. The boundary of the high La Veta MOA should be changed to coincide with the recommendation for the low La Veta MOA.

Altitudes: The La Veta High MOA floor would remain at 13,000 feet MSL. The La Veta Low MOA floor should be 1,500 feet AGL.

3. Airburst MOAs.

Airburst A: As proposed in the DOPAA, except that the southern boundary should be modified as depicted in Figure 3 to exclude Cañon City and the town of Penrose.

Airburst B: As proposed in the DOPAA.

Airburst C: Should not be established. Rather, the existing IR-409, to coincide with IR-415, XIR-424 and XVR-1427 should be used to access the Airburst Range. After entering the Range, maneuvering should be confined to Airburst A and B and Restricted Area R-2601, by coordination with the scheduling agency. The working committee believes that such interservice cooperation will allow more efficient utilization of existing special use airspace and allow the Air National Guard to meet its requirements without burdening other interests by the establishment of proposed Airburst C. This is the one point on which the Working Committee did not reach unanimous consensus with three members considering proposed Airburst C advisable.

4. Two Buttes Low MOA.

This area of southeastern Colorado is already subjected to a heavy noise burden by USAF Air Combat Command (ACC) B-1 bomber low-level flight operations on MTRs not included in the Colorado Airspace Initiative. Operating 255 days per year, these bombers fly 2,596 sorties per year throughout the proposed Two Buttes MOA at this time. The Working Committee recommends that the Two Buttes Low MOA be implemented as proposed in the DOPAA if and only if the ACC will reduce bomber operations in the area to a maximum of 2,000 sorites per year, to be flown on no more than 200 days per year at 4 days per week, 50 weeks per year. This will provide residents of this area with some relief from the bomber noise in consideration of the imposition of COANG'S additional burden of fighter noise. Colorado Air National Guard should advise communities under the Two Buttes Low MOA by news media of the weekend flight training schedule. (See figure 4.)

5. Two Buttes High MOA.

As proposed in the DOPAA.

C. Other Issues:

1. Avoidance of Sensitive Areas.

The Working Committee recommends that provision be made to identify, chart and brief flight crews to avoid sensitive areas and activities by a 1.5 NM lateral radius or an altitude sufficient to accomplish a noise reduction at the surface equal to that accomplished by a 1.5 NM lateral offset. These sensitive areas should be determined by agency and citizen input and may include (but should not be limited to) towns,

residences, spiritual retreat centers, noise-sensitive livestock operations, migratory routes, breeding sites for endangered species, etc.

2. Reporting.

The Working Committee recommends that COANG be required to submit an annual report to the Governor and General Assembly. This report should be available to the public and, as a minimum, should contain: the number of aircraft sorties flown in Colorado Airspace Initiative (CAI) airspace; the number of sorties compared to sortie caps in the record of decision flown by COANG and other units in each element (MTR and MOA) of that airspace; the previous three years' comparison of actual use of each element of the CAI; an explanation of any changes in usage of any element; a descriptive summary of projected training activities for the coming year; changes in budget which affect airspace usage; changes in type and number of aircraft being used by the COANG; number of Colorado Air National Guard pilots; summary report on accidents, incidents, complaints, disciplinary actions and other resolutions, and changes in training requirements which have been imposed by the National Guard Bureau.

3. Noise Study.

The Working Committee is concerned that the LDN method of noise assessment will not accurately reflect noise impact of the CAI on humans, livestock and wildlife in remote rural and mountainous areas affected by the CAI. The Working Committee believes that such methodology will seriously underestimate or fail to take into account altogether, the startle effect of sudden onset noise generated by the proposed

high speed, low altitude flights. The Working Committee is also concerned that the proposed prairie noise study to be conducted in the Kit Carson (Cheyenne) MOA will not account for terrain effects such as echoes that might affect the volume, duration, and intensity of aircraft noise in mountain valleys. The Working Committee recommends that data derived from the noise study be interpreted by methodologies that take into account all potentially relevant factors, rather than relying solely on LDN criteria that the Working Committee believes would not thoroughly assess noise impact. The Working Committee recommends that COANG should conduct follow-up noise study during the first two years of full operation of the airspace. The noise study must address cumulative impact of all aircraft utilizing the affected airspace. The Working Committee also recommends three independent representatives be present during the noise study sessions that are used for EIS data, and that B-1 Bombers also be included in the Bison Study.

Sixty-first General Assembly

LLS NO. R98-0564.01 GWF

STATE OF COLORADO

ENGROSSED
STATE, VETERANS AND
MILITARY AFFAIRS

BY SENATORS Dennis and Johnson;
also REPRESENTATIVE Spradley.

SENATE JOINT RESOLUTION 98-010

CONCERNING THE IMPACT OF THE COLORADO AIRSPACE INITIATIVE.

WHEREAS, The General Assembly values the dedication and expertise of the members of the Colorado Air National Guard as well as their commitment to securing and maintaining the national defense; and

WHEREAS, The General Assembly seeks to protect the safety of residents and visitors of the state of Colorado, desires to protect the economic future of the state, and wishes to minimize environmental impacts in all areas of the state including those underlying military airspace; now therefore

Be It Resolved by the Senate of the Sixty-first General Assembly of the State of Colorado, the House of Representatives concurring herein;

That it is the will of the General Assembly that the Colorado Air National Guard shall diligently pursue with input from community interest groups, funding for the relocation of Airburst Bombing Range and the potential elimination of La Veta Military Operation Area and its associated Military Training Routes.

Be It Further Resolved, That, until the Colorado Airspace Initiative is approved, the Colorado Air National Guard, to the extent possible within boundaries of existing military airspace, shall implement the minimum altitude increases, route width reductions, avoidance measures, and mitigations specified in the final environmental impact statement and record of decision. Should the Colorado Air National Guard initiate changes in the Colorado Airspace Initiative it shall make every effort to involve all concerned citizens.

Be It Further Resolved, That the Colorado Air National Guard shall submit a copy of its annual record of the authorized use, including out-of-state and foreign aircraft of its training airspace to the Colorado General Assembly and upon request to any board of county commissioners of each affected county on or before January 1 following the end of the previous federal fiscal year.

Be It Further Resolved, That copies of this Joint Resolution be sent to the Colorado Air National Guard, the Federal Aviation Administration, the United States Department of Defense, United States Senators and United States Representatives from the state of Colorado, and the Governor of the state of Colorado.

Supreme Court, U.S.
FILED
DEC 26 200
CLERK

No. 01-652

In the Supreme Court of the United States

CUSTER COUNTY ACTION ASSOCIATION, ET AL.,
PETITIONERS

v.

JANE F. GARVEY, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners challenge final actions of the Federal Aviation Administration (FAA) and the Colorado Air National Guard approving the Colorado Airspace Initiative (CAI), which modified the FAA's designations of airspace that the Colorado Air National Guard uses for training its pilots. The questions presented are:

1. Whether the FAA's determination, made in consultation with the Secretary of Defense, that the CAI was necessary in the interest of national defense presents a nonjusticiable political question.

2. Whether the FAA satisfied the requirements of 49 U.S.C. 40103(b)(3) by determining that the CAI was necessary in the interest of national defense and articulating the reasons for its determination.

3. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, required the FAA and the Colorado Air National Guard to prepare, as part of their environmental review of the CAI, an environmental impact statement covering all designations of airspace for military use throughout the United States.

4. Whether the FAA's designation of airspace for military use to implement the CAI violates the Third Amendment's prohibition on quartering soldiers in a house during peacetime without the owner's consent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Aktepe v. *United States*, 105 F.3d 1400 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998)	8
Arnhold v. *United States*, No. 4:88 CV 934 WLH (88-0934C(3)), U.S. Dist. LEXIS 17904 (E.D. Mo. June 13, 1989)	14
Baker v. *Carr*, 369 U.S. 186 (1962)	7
Braniff Airways, Inc. v. *Civil Aeronautics Bd.*, 306 F.2d 739 (D.C. Cir. 1962)	11
California v. *Ciraolo*, 476 U.S. 207 (1986)	14
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	10
D&F Afonso Realty Trust v. *Garvey*, 216 F.3d 1191 (D.C. Cir. 2000)	11
Florida v. *Riley*, 488 U.S. 445 (1989)	14
Gibson v. *FAA*, 714 F. Supp. 233 (E.D. Tex. 1989)	11
Gilligan v. *Morgan*, 413 U.S. 1 (1973)	4, 7, 8
Holmes v. *Helms*, 705 F.2d 343 (9th Cir. 1983)	11
Kyllo v. *United States*, 121 S. Ct. 2038 (2001)	14
Morongo Band of Mission Indians v. *FAA*, 161 F.3d 569 (9th Cir. 1998)	12
NORML v. *Mullen*, 608 F.Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986)	14
Northwest Resource Info. Ctr., Inc. v. *National Marine Fisheries Serv.*, 56 F.3d 1060 (9th Cir. 1995)	12
Smith v. *Butler*, 366 U.S. 161 (1961)	9

Cases—Continued: Page

South Carolina v. *OLeary*, 64 F.3d 892 (4th Cir. 1995) 12
Sylvester v. *U.S. Army Corps of Eng'rs*, 884 F.2d 394 (9th Cir. 1989) 12
Town of Huntington v. *Marsh*, 859 F.2d 1134 (2d Cir. 1988) 12
United States v. *Causby*, 328 U.S. 256 (1946) 13

Constitution, statutes and regulations:

U.S. Const.:
Amend. III 13, 14, 15
Amend. IV 14
Amend. V 14
Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 5
5 U.S.C. 701(a)(1) 9
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 14
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 3
49 U.S.C. 40103(b) 7
49 U.S.C. 40103(b)(1) 2, 10
49 U.S.C. 40103(b)(2) 2, 10
49 U.S.C. 40103(b)(3) 6, 10
49 U.S.C. 40103(b)(3)(A) 2, 4, 5, 9, 10
49 U.S.C. 40103(b)(3)(B) 2, 9, 10
49 U.S.C. 40109(b) 13
49 U.S.C. 46105(b) 10, 11
49 U.S.C. 46110 9
14 C.F.R.:
Pt. 73 ..... 4, 10
Pt. 91:
Section 91.119 13
40 C.F.R.:
Section 1508.25(a)(1) 6
Section 1508.25(a)(1)(iii) 12

Miscellaneous: Page

Procedures for Handling Airspace Matters, FAA Order 7400.2E, Pt. 5 (Dec. 7, 2000) 4

In the Supreme Court of the United States

No. 01-652

CUSTER COUNTY ACTION ASSOCIATION, ET AL.,
PETITIONERS

v.

JANE F. GARVEY, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 256 F.3d 1024.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2001. The petition for a writ of certiorari was filed on October 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has given the Federal Aviation Administration (FAA) exclusive jurisdiction over navigable

airspace and broad authority to regulate the use of that airspace. See 49 U.S.C. 40103. Among her other responsibilities, the Administrator of the FAA may assign use of airspace and prescribe air traffic regulations. 49 U.S.C. 40103(b)(1) and (2). "[I]n consultation with the Secretary of Defense," the Administrator also is directed to "establish areas in the airspace [she] decides are necessary in the interest of national defense." 49 U.S.C. 40103(b)(3)(A). When she establishes such areas, the Administrator must "restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas." 49 U.S.C. 40103(b)(3)(B).

2. The Colorado Air National Guard is a reserve component of the United States Air Force that is based at Buckley Air National Guard Base, near Denver. The Colorado Air National Guard has participated in Air Force operations in Iraq, Colombia, and elsewhere. To be able to perform its mission, the Colorado Air National Guard must conduct frequent, realistic training exercises. Pet. App. 5, 59-60.

During the early 1990s, the Colorado Air National Guard—in consultation with state and federal agencies, elected officials, and members of the public—developed the Colorado Airspace Initiative (CAI) in order to provide sufficient airspace for realistic training with its jet fighters and to accommodate the needs of commercial aircraft using the new Denver International Airport. Pet. App. 4-5; see Pet. 3-4. As finally approved by the FAA, the CAI resulted in 14 changes to the boundaries of areas designated as being used by the Colorado Air National Guard for nonhazardous flight training and for access to training areas. See Pet. App. 5-7.

Pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the FAA also approved an Environmental Impact Statement (EIS), initially prepared by the Colorado Air National Guard, assessing the potential environmental effects of the CAI. The EIS comprehensively reviewed issues including noise, land use, safety, visual resources and aesthetics, biological resources, cultural resources, air quality, and socioeconomic impacts. See Pet. App. 50-51. The EIS addressed three alternative proposals in detail: the Colorado Air National Guard's preferred version of the CAI, a variation on the preferred version, and a "no-action" alternative under which there would be no change to existing airspace designations. See *id.* at 45-50 (discussing alternatives). The EIS indicated that the number of military flights would be reduced under either of the CAI alternatives, as compared to the no-action alternative. *Id.* at 45. Furthermore, the two CAI proposals had distinct environmental advantages over the existing airspace designations, particularly because they raised minimum flight altitudes for normal operations from ground level to levels of at least 300 to 500 feet above ground level. 8/97 EIS at xxvi.

In October 1997, the Colorado Air National Guard issued a Record of Decision adopting a modified version of its preferred CAI option. Pet. App. 59-91. The FAA then solicited public comment and held informal public meetings on whether to adopt the Colorado Air National Guard's final EIS and designate new Military Training Routes and Military Operations Areas in accordance with the CAI. See *id.* at 53-55.[1] Based on

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[1] The CAI did not require the designation of Restricted Areas (which confine or segregate activities considered to be hazardous to nonparticipating aircraft) or Prohibited Areas (in which flight is

public comments and its own review of the CAI, the FAA required additional mitigation measures that reduced the airspace designated under the CAI and prohibited military operations between 10 p.m. and 7 a.m. See *id.* at 51-53. In a Record of Decision released in October 1999 (*id.* at 41-58), the FAA determined that the Colorado Air National Guard's EIS complied with applicable legal requirements, adopted the EIS, and determined to implement the requested airspace designations (as modified by the FAA).

3. Petitioners and others sought judicial review of the final decisions of the Colorado Air National Guard and the FAA. The court of appeals denied the petition for review and affirmed the challenged orders. Pet. App. 1-40.

The court of appeals first considered petitioners' argument that the record evidence did not allow a conclusion that adoption of the CAI was necessary in the interest of national defense, which petitioners claimed was required under 49 U.S.C. 40103(b)(3)(A). See Pet. App. 9-10, 11-12. Citing this Court's decision in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), the court of appeals concluded that the political question doctrine precluded it "from second-guessing or interfering with the FAA's decision," made in consultation with the Secretary of Defense, that the CAI was necessary in the interest of national defense. Pet. App. 12. The court of appeals determined, however, that it was "free to review whether, in making that decision, the FAA

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prohibited for reasons of national security or welfare). See Pet. App. 6, 13; see generally 14 C.F.R. Pt. 73. The FAA establishes Restricted Areas and Prohibited Areas through formal rulemaking. See generally *Procedures for Handling Airspace Matters*, FAA Order 7400.2E, Pt. 5 (Dec. 7, 2000) (available at <http://www.faa.gov/atpubs/AIR/Index.htm>).

acted within the scope of its powers, followed its own regulations, and complied with the Constitution." *Ibid.*

The court of appeals then proceeded to evaluate petitioners' arguments on the issues it had identified as justiciable. Pet. App. 13-18. Initially, the court observed that 49 U.S.C. 40103(b)(3)—which authorizes the Administrator to "restrict or prohibit flight of civil aircraft"—arguably did not apply to the FAA's approval of the CAI, because none of the airspace designations contemplated by the CAI restricted or prohibited access by civil aircraft. Pet. App. 13; see also note 1, *supra*. The court did not rest on that point, however. Instead, the court concluded that, because the FAA's proceeding was not subject to the requirements of the Administrative Procedure Act (APA) for a formal agency rulemaking, see 5 U.S.C. 551 *et seq.*, the FAA was not required to make formal findings about necessity for national defense. Pet. App. 13-14. It was sufficient to satisfy Section 40103(b)(3)(A), the court concluded, that the record "amply demonstrates the FAA did, in fact, believe the [CAI] to be necessary in the interest of national defense, and articulated the reasons why." *Id.* at 14. The court also rejected petitioners' claims—not raised before this Court—that the FAA failed to comply with its own regulations and policies and unlawfully delegated its authority to the military. See *id.* at 14-18.

The court of appeals next rejected petitioners' challenges to the EIS. Pet. App. 20-35. As relevant here, petitioners argued that the Colorado Air National Guard and the FAA were required to evaluate not only the effects of the CAI, but also "the impact of the nationwide proliferation of military airspace and low-level military aircraft operations." *Id.* at 24 (internal quotation marks omitted). The court of appeals noted

that, under regulations promulgated by the Council on Environmental Quality to implement NEPA, different actions must be analyzed in the same EIS only if they are "connected" and, in particular, if they lack independent utility. *Id.* at 25-26; see 40 C.F.R. 1508.25(a)(1). The court explained that the record in this case did not suggest a nexus between the CAI and other military uses of domestic airspace, or that it was irrational to implement the CAI without regard to other military airspace designations or flight programs. For those reasons, the court concluded, a comprehensive, nationwide EIS was not required. Pet. App. 26.

Finally, the court of appeals rejected (Pet. App. 35-40) petitioners' claims that implementation of the CAI should be enjoined because it constituted a taking of private property without statutory authorization and a quartering of soldiers in violation of the Third Amendment. The claim of an unauthorized taking relied on petitioners' challenges under Section 40103(b)(3) and NEPA, and necessarily failed because the court had found that neither the FAA nor the Colorado Air National Guard exceeded their statutory authority. See *id.* at 35-37. The court of appeals determined that petitioners' Third Amendment claim was without support and "borders on frivolous," and noted that accepting it would require the United States military to obtain consent from all landowners over whose property its planes might fly. *Id.* at 38-39.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Nor does the decision below raise any issue of extraordinary importance. Review by this Court therefore is not warranted.

1. Petitioners claim that the court of appeals rendered "an expansive and unprecedented interpretation of the political question doctrine," Pet. 9, and in so doing ignored statutory provisions that authorize judicial review of decisions made under 49 U.S.C. 40103(b), see Pet. 11. In fact, the court of appeals narrowly held that while determining the necessity of Air National Guard flights in Colorado involved a nonjusticiable political question, the court did have jurisdiction to review whether the FAA's determination that the CAI was necessary was consistent with the Constitution, the FAA's statutory authority, and governing regulations. See Pet. App. 11-12. The court of appeals correctly applied this Court's decision in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and petitioners do not claim that there is a conflict with a decision of another court of appeals.

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker* v. *Carr*, 369 U.S. 186, 210 (1962). Accordingly, a case presents a nonjusticiable question if it involves, among other things, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. In *Gilligan*, students at Kent State University, following the protests and shootings there in 1970, sought "a judicial evaluation of the appropriateness of the training, weaponry and orders of the Ohio National Guard." 413 U.S. at 5-6 (internal quotation marks omitted). This Court explained that the plaintiffs had "overlook[ed] the explicit command of Art. I, § 8, cl. 16, which vests in Congress the power * * * '[t]o provide for organizing, arming, and disciplining the Militia,'" as well as the President's role in organization and discipline of the National Guard as Commander-in-Chief of the Armed Forces. *Id.* at 6-7. The Court held that judicial review of the National

Guard's training, weaponry, and orders would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." *Id.* at 7. The Court added that "it is difficult to conceive of an area of governmental activity in which the courts have less competence" and that "ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Id.* at 10. Accordingly, the Court held that a nonjusticiable political controversy was presented. *Id.* at 10-11.

In this case, the Tenth Circuit correctly followed *Gilligan* and declined to second-guess the FAA's determination, made in consultation with the Department of Defense, that the CAI was necessary in the interest of national defense. That determination was a mixed question of fact, military judgment, and policy—whether particular military training is necessary in the interest of national defense. The court correctly refused to substitute its judgment for the judgment of the FAA on that question. Cf. *Aktepe* v. *United States*, 105 F.3d 1400, 1402-1404 (11th Cir. 1997) (suit for wrongful death and personal injuries resulting from alleged negligent conduct of naval training exercise presented nonjusticiable political question), cert. denied, 522 U.S. 1045 (1998).[2] Indeed, even as a statutory matter, there is no

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[2] Petitioners suggest (Pet. 10) that the political question doctrine applies to "only a very narrow category of decisions made by the military itself." Under the Constitution, however, military decisions are always subject to civilian control. See *Gilligan*, 413 U.S. at 10. Thus, petitioners' distinction between the necessity determination made by the FAA in consultation with the Department of Defense and a decision made "by the military itself" is untenable.

reason to believe that 49 U.S.C. 46110—which authorizes judicial review of FAA orders—should be read to authorize judicial review of such a discretionary judgment by the FAA. Cf. 5 U.S.C. 701(a)(1) (excluding actions that are "committed to agency discretion by law" from judicial review under APA).

2. Petitioners next suggest (Pet. 13-22) that the court of appeals ruled that because 49 U.S.C. 40103(b)(3)(A) did not apply to the CAI, the FAA was not required to find that the airspace designations contemplated by the CAI were necessary in the interest of national defense. That holding, petitioners claim, was error. In fact, the court of appeals stated only that Section 40103(b)(3)(A) "[a]rguably * * * d[id] not apply" in this case. Pet. App. 13. The court's actual holding was that, if Section 40103(b)(3)(A) *did* apply, the FAA satisfied its mandate by determining, in consultation with the Department of Defense, that the CAI was necessary in the interest of national defense and by articulating its reasons for that determination. *Id.* at 14. The court of appeals' holding was correct.

a. Certiorari is not warranted to review the court of appeals' statement that Section 40103(b)(3)(A) arguably did not apply, because that statement was dictum. Cf. *Smith* v. *Butler*, 366 U.S. 161 (1961) (writ improvidently granted when decision of the court below did not turn on issue on which certiorari was granted). Nor would it have been error if the court of appeals had rested its decision on that ground. Section 40103(b)(3)(A) provides that the FAA Administrator "shall * * * establish areas in the airspace" that she "decides are necessary in the interest of national defense." Section 40103(b)(3)(B) makes clear that the "areas" referred to in Section 40103(b)(3)(A) are areas in which the FAA "restrict[s] or prohibit[s] flight of civil aircraft that [it]

cannot identify, locate, and control with available facilities." 49 U.S.C. 40103(b)(3)(B). In other words, the "areas in the airspace" referred to in Section 40103(b)(3)(A) are Restricted Areas and Prohibited Areas designated under 14 C.F.R. Part 73. See note 1, *supra*. Because implementation of the CAI did not require the establishment or modification of any Restricted Area or Prohibited Area, see Pet. App. 13, Section 40103(b)(3) did not apply. Rather, the FAA acted pursuant to 49 U.S.C. 40103(b)(1), which broadly authorizes the agency to "assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."[3]

b. The court of appeals also did not err when it held that the FAA adequately explained the basis for its approval of the CAI. See Pet. 19-22. As the court of appeals noted (Pet. App. 13), agencies generally are not required to make formal findings in support of their determinations unless a specific statutory directive requires them to do so. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417 (1971). Petitioners claim (Pet. 18, 21) to find such a statutory mandate in 49 U.S.C. 40103(b)(3) and 46105(b). As discussed above, Section 40103(b)(3) simply requires a decision by the Administrator, "in consultation with the Secretary of Defense," as to whether flight restrictions "are necessary in the interest of national defense." 49 U.S.C. 40103(b)(3)(A). It does not mandate formal findings. Section 46105(b) states that the Administra-

[3] Petitioners suggest (Pet. 17 n.2) that the applicability of aircraft separation rules within CAI airspace constitutes a restriction on civil aviation and triggered 49 U.S.C. 40103(b)(3). That argument ignores 49 U.S.C. 40103(b)(2), which authorizes the FAA to prescribe air traffic regulations without regard to whether there is a restriction on flight under Section 40103(b)(3).

tor's orders "shall include the findings of fact on which the order is based and shall be served on the parties to the proceeding and the persons affected by the order." Section 46105(b) is codified in Chapter 461 of Title 49, which establishes procedures for formal complaint proceedings, investigations, and enforcement actions, and addresses matters such as recording of proceedings, service of process, subpoenas, depositions, and witness fees. Consistent with the reference in Section 46105(b) to "the parties to the proceeding," the requirement of formal fact-findings is best read as being limited to adjudicatory proceedings, not informal decisions such as the FAA's approval of the CAI.

Even if Section 46105(b) did require the FAA to "include * * * findings of fact" in its Record of Decision in this case, however, the agency complied with that requirement. The FAA satisfies that requirement if the factual basis for its decision is set forth somewhere in the record, see, *e.g.*, *Holmes* v. *Helms*, 705 F.2d 343, 346 (9th Cir. 1983); *Gibson* v. *FAA*, 714 F. Supp. 233, 234 (E.D. Tex. 1989), and if a court can understand the basis of the agency's decision, see *Braniff Airways, Inc.* v. *Civil Aeronautics Bd.*, 306 F.2d 739, 742 (D.C. Cir. 1962). The court of appeals found (Pet. App. 14) that the FAA "articulated the reasons" why it believed the CAI to be necessary, which satisfied the requirement of Section 46105(b) if it applied.[4] That fact-based holding does not warrant this Court's review.

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[4] *D&F Afonso Realty Trust* v. *Garvey*, 216 F.3d 1191 (D.C. Cir. 2000), on which petitioners rely (Pet. 21-22 n.4), is not to the contrary. There, the court held that the FAA had "abandon[ed] * * * its own established procedure" and failed to provide a "reasoned analysis on the record." 216 F.3d at 1196-1197.

3. Petitioners next challenge (Pet. 22-26) the court of appeals' holding (Pet. App. 24-26) that the EIS in this case was not deficient for failing to address the nationwide impact of all military aircraft operations in military-use airspace. Petitioners contend (Pet. 23) that all such operations are "connected actions" that, under the Council on Environmental Quality's regulations implementing NEPA, should have been considered in the EIS. They rely specifically on 40 C.F.R. 1508.25(a)(1)(iii), which provides that "connected actions" include actions that "[a]re interdependent parts of a larger action and depend on the larger action for their justification."

The courts have consistently held that actions are not "connected" under that regulation if they have independent utility. *E.g.*, *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 579-580 (9th Cir. 1998); *South Carolina* v. *O'Leary*, 64 F.3d 892, 899 (4th Cir. 1995); *Town of Huntington* v. *Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988). Actions are independent, not connected, if they "could exist without the other, although each would benefit from the other's presence." *Northwest Resource Info. Ctr., Inc.* v. *National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995) (quoting *Sylvester* v. *U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989)). The court below applied that accepted test and determined as a factual matter that the CAI had independent utility. Pet. App. 25-26. Although petitioners disagree with the court's conclusion (Pet. 24-25), their factual arguments do not raise any legal issue that warrants this Court's review, nor do they show that the justifications supporting implementation of the CAI (*i.e.*, training requirements and the opening of the Denver International Airport) de-

pended on approval of all other military airspace proposals across the Nation.

4. Finally, petitioners claim that approval and implementation of the CAI violated the "philosophical underpinnings" of the Third Amendment. Pet. 26. The Third Amendment provides, in relevant part, that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner." U.S. Const. Amend. III. The court of appeals correctly rejected petitioners' constitutional claim, and its holding is not in conflict with the decision of any other court.

Congress long ago declared navigable airspace to be a public highway, thereby superseding the common law notion that ownership of land also includes ownership of the airspace above it. See *United States* v. *Causby*, 328 U.S. 256, 260-261 (1946). Accordingly, even assuming for purposes of argument that the protection of the Third Amendment might under some circumstances extend beyond a "house," the Amendment does not guarantee petitioners the right to exclude military aircraft from navigable airspace. See Pet. App. 39.

Petitioners nevertheless argue (Pet. 28) that the Third Amendment is implicated insofar as the CAI authorizes low-level flights that are outside navigable airspace. In particular, they speculate (Pet. 27-28) that, under the CAI, pilots might fly below the minimum safe flying altitudes specified by the FAA in 14 C.F.R. 91.119. The court of appeals correctly rejected that argument, explaining (Pet. App. 16-18) that Colorado Air National Guard pilots are in fact required to comply with Section 91.119 and, in any event, the FAA has authority under 49 U.S.C. 40109(b) to grant exemptions from its generally applicable safety requirements. Petitioners do not make any argument that the court of appeals erred in holding that the CAI designates only

navigable airspace for military use, and this holding forecloses petitioners' Third Amendment argument.

Petitioners purport (Pet. 29-30) to find support for their Third Amendment claim in *Arnhold* v. *United States*, No. 4:88 CV 934 WLH (88-0934C(3)) U.S. Dist. LEXIS 17904 (E.D. Mo. June 13, 1989), an unpublished district court decision. That case involved a claim under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for property damage caused by sonic booms from military aircraft. No such tort claims are involved in this case.

Nor do Fourth Amendment principles support petitioners' constitutional claim. In *NORML* v. *Mullen*, 608 F. Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986), on which petitioners rely (Pet. 29), the district court ruled that helicopter surveillance violated the Fourth Amendment because law enforcement personnel were not "just surveying open fields, but [were] deliberately looking into and invading peoples' homes and curtilage." 608 F. Supp. at 957. There is no such surveillance here. Furthermore, this Court held shortly after *NORML* was decided that surveillance of a home's curtilage from an aircraft within navigable airspace does not violate the Fourth Amendment. *California* v. *Ciraolo*, 476 U.S. 207 (1986); see also *Florida* v. *Riley*, 488 U.S. 445 (1989).

The court of appeals' rejection of petitioners' Third Amendment claim does not leave property-owners who endure frequent, highly disruptive overflights "at the mercy of advancing technology." Pet. Br. 29 (quoting *Kyllo* v. *United States*, 121 S. Ct. 2038, 2044 (2001)). Such owners may bring a claim for compensation under the Takings Clause. See *United States* v. *Causby*, *supra*. The availability of a Fifth Amendment remedy

in proper cases further confirms that petitioners' tortured reading of the Third Amendment is incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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